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**A theory of configurative fairness for evolving International legal orders
linking the scientific study of value subjectivity to Jurisprudential thought**

Behn, Daniel

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Daniel Behn

2013

University of Dundee

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**A THEORY OF CONFIGURATIVE FAIRNESS FOR
EVOLVING INTERNATIONAL LEGAL ORDERS**

**LINKING THE SCIENTIFIC STUDY OF VALUE
SUBJECTIVITY TO JURISPRUDENTIAL THOUGHT**

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**CENTRE FOR ENERGY, PETROLEUM, AND MINERAL LAW AND POLICY
UNIVERSITY OF DUNDEE**

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TABLE OF CONTENTS

ABSTRACT	10
PREFACE	12
ACKNOWLEDGEMENTS	14
DECLARATION	15
ABBREVIATIONS	16
 CHAPTER 1: AN INTRODUCTION	 18
1. INTRODUCTION	18
2. A STARTING POINT.....	23
3. TWO PRELIMINARY DISTINCTIONS	28
3.1 Value Epistemology and Value Ontology.....	30
3.2 The Internal and the External	32
4. THE VALUE OF METHOD AND THEORY	35
4.1 The New Haven School and Q Methodology	36
4.2 A Fair Configuration of Shared Subjectivity	40
4.3 The Evolution of Investment Treaty Arbitration.....	41
5. VALUES AND JURISPRUDENTIAL THOUGHT	46
6. A ROAD MAP	47
6.1 Research Questions	48
6.2 A Brief Outline	48
6.2.1 Between Objective Fact and Subjective Value	48
6.2.2 Legal Positivism and Legal Nonpositivism	49
6.2.3 Values and International Legal Theory	50
6.2.4 A Theory of Configurative Fairness	50
6.2.5 Q Methodology and Legal Analysis	51
6.2.6 Investment Treaty Arbitration and Its Discontents.....	51
6.2.7 Configuring Fairness in Investment Treaty Arbitration.....	52
6.2.8 The Way Forward	52
 CHAPTER 2: BETWEEN OBJECTIVE FACT AND SUBJECTIVE VALUE	 53
1. INTRODUCTION	53
2. WHAT IS A FACT AND WHAT IS A VALUE	54
3. A BRIEF HISTORY OF FACT AND VALUE.....	56
3.1 The Humean Legacy.....	57
3.1.1 Moral Antirationalism	58
3.1.2 Matters of Fact and Relation of Ideas.....	59
3.1.3 The Is-Ought Problem	59
3.2 The Rational (Re)Turn	60
3.3 Hegelian Subjectivity.....	63
3.4 The Logical Positivists	64

3.5	The Philosophy of Pragmatism	66
3.6	The Entanglement of Fact and Value	69
4.	THE PHILOSOPHY OF VALUES	70
4.1	The Concept of Values	71
4.1.1	Value Epistemology and Value Ontology	72
4.1.2	Three Possibilities	73
4.1.2.1	Objective-Objective	75
4.1.2.2	Subjective-Subjective	76
4.1.2.3	Objective-Subjective	77
4.2	The Content of Values	78
4.2.1	Moral and Social Values	79
4.2.2	Epistemic Values are Values Too	81
5.	GAINING KNOWLEDGE ABOUT VALUES	81

CHAPTER 3: LEGAL POSITIVISM AND LEGAL NONPOSITIVISM.....84

1.	INTRODUCTION	84
2.	JURISPRUDENCE IN GENERAL.....	86
2.1	The Concept of Law and the Content of Law	86
2.2	Theories About Law and Theories About Decision.....	89
2.3	Legal Decision and Legal Discourse	91
2.4	Theories About Law and Theories About Justice.....	93
3.	LEGAL POSITIVISM AND LEGAL NONPOSITIVISM	95
3.1	Legal Positivism	97
3.1.1	A Brief History of Legal Positivism	97
3.1.2	HLA Hart and Hans Kelsen	100
3.2	Legal Nonpositivism	103
3.2.1	Natural Law.....	104
3.2.1.1	Ronald Dworkin	105
3.2.1.2	John Finnis.....	107
3.2.2	The Shift to Legal Process	108
3.2.2.1	Lon Fuller	109
3.2.2.2	The Legal Process School.....	110
3.2.2.3	Legal Realism	111
3.2.2.4	The New Haven School	112
4.	JURISPRUDENCE AND VALUES	114
4.1	The Verification and Justification Problems.....	115
4.2	Shared Subjectivity About Value	117

CHAPTER 4: VALUES AND INTERNATIONAL LEGAL THEORY..... 120

1.	INTRODUCTION	120
2.	WHY VALUES MATTER IN INTERNATIONAL LAW.....	124
2.1	The Politics of International Law	127
2.2	Koskenniemi's Critique	131

2.3	Evolving Global Legal Orders.....	132
3.	CONTEMPORARY INTERNATIONAL LEGAL THEORY	134
3.1	An International Law of Rules?.....	135
3.2	The (Political) Realist Attack.....	135
3.3	The Post-War Context	136
3.3.1	The Postmodern Turn	137
3.3.2	The Influence From International Relations	138
3.4	Process-Based Approaches.....	139
3.4.1	Abram and Antonia Chayes and Thomas Franck	141
3.4.2	Michael Reisman and Rosalyn Higgins	142
3.4.3	Harold Koh and Anne-Marie Slaughter	144
3.5	Recent Scholarship	144
4.	THE JURISPRUDENCE OF LASSWELL, MCDUGAL, AND REISMAN.....	146
4.1	The Background	147
4.2	Four Foci for a Theory About Law.....	149
4.2.1	A Focus on Decision.....	149
4.2.2	A Contextual Inquiry.....	150
4.2.3	An Ongoing Process	150
4.2.4	Goal and Value Orientated	151
4.3	Five Criteria for a Theory About Law	152
4.3.1	The Observational Standpoint	152
4.3.2	The Focus of Inquiry	153
4.3.3	The Identification of Particular Problems	155
4.3.4	The Postulation of Public Order Goals	156
4.3.5	The Performance of Intellectual Tasks	156
4.4	A Nonpositivist Jurisprudence	157
5.	SHARED SUBJECTIVITY IN CONFIGURATIVE JURISPRUDENCE.....	158

CHAPTER 5: A THEORY OF CONFIGURATIVE FAIRNESS..... 160

1.	INTRODUCTION	160
2.	FAIRNESS VERSUS JUSTICE	163
2.1	Distinctions Between Fairness and Justice.....	164
2.2	Justice as Fairness	166
3.	WHY FAIRNESS MATTERS.....	168
3.1	Thomas Franck's Fairness	169
3.2	The Centrality of Participants in Legal Evolution	171
4.	CONSTRUCTIVISM IN POLITICS AND ETHICS	172
4.1	Philosophic Constructivism.....	173
4.2	Constructivism Versus Configurativism.....	176
4.2.1	Internal Unity of Value.....	179
4.2.2	Internal Value Realism.....	180
4.2.3	Idealization Versus Abstraction	181
4.3	The Ideas of John Rawls and Jürgen Habermas	183
4.3.1	John Rawls.....	183

4.3.1.1 Reflective Equilibrium	186
4.3.1.2 An Overlapping Consensus.....	188
4.3.2 Jürgen Habermas	189
5. CONSTRUCTIVISM IN LAW AND INTERNATIONAL LAW	193
6. CONFIGURING FAIRNESS IN LEGAL DECISION AND DISCOURSE	195

CHAPTER 6: Q METHODOLOGY AND LEGAL ANALYSIS 197

1. INTRODUCTION	197
2. THE THEORETICAL UNDERPINNINGS OF Q METHODOLOGY	199
2.1 Q Methodology Versus R Methodology	202
2.2 Operant Subjectivity and Concourse Theory	208
2.3 The Science of Subjectivity	211
2.4 Q Methodology and Quantum Theory	213
3. THE TECHNIQUE OF Q METHODOLOGY.....	215
3.1 The Concourse.....	216
3.2 The Q Set.....	216
3.3 The P Set	218
3.4 The Q Sort	219
3.5 The Analysis	222
3.6 The Interpretation.....	225
4. Q METHODOLOGY AND LEGAL ANALYSIS	226
4.1 Configurative Jurisprudence and Q Methodology.....	227
4.2 Shared Subjectivity and Value Consensus.....	230

CHAPTER 7: INVESTMENT TREATY ARBITRATION AND ITS DISCONTENTS..... 232

1. INTRODUCTION	232
2. THE LAW ON THE PROTECTION OF FOREIGN ALIENS.....	235
3. THE MODERN INVESTMENT TREATY REGIME.....	239
3.1 The Beginnings	240
3.2 Decolonization and the New International Economic Order	242
3.3 ICSID, the Middle East Arbitrations, and the Iranian Revolution.....	244
3.4 The Fall of the Soviet Union and the Washington Consensus	246
3.5 Antiglobalization and the Backlash	248
4. THE BACKLASH AGAINST INVESTMENT TREATY ARBITRATION	250
4.1 A Summary of the Issues	252
4.2 The First Wave.....	254
4.2.1 The Loewen Case and the Perceived Threat to Sovereignty	254
4.2.2 The SGS Cases and the Problems of Precedent and Consistency ...	256
4.2.3 The Lauder Cases and the Problem of Multiple Proceedings	258
4.3 The Second Wave	260
4.3.1 The Argentinian Economic Crisis	260
4.3.2 A Pro-Investor Bias?.....	261

4.3.3	The Backlash Against the Backlash.....	262
4.3.4	Human Rights and the Environment	263
4.3.5	A Democratic Deficit?.....	265
4.4	The Third Wave.....	266
4.4.1	The Return of the State	266
4.4.2	The Continued Development of the Investment Regime	268
4.4.3	The Annulment of Argentine ICSID Decisions	270
4.4.4	The Focus on Substantive Standards	271
4.4.6	The Need for a Standard of Review?.....	273
4.4.7	The Rise of the System Destroyers.....	274
5.	SOLVING THE FAIRNESS DEBATE	275

CHAPTER 8: CONFIGURING FAIRNESS IN INVESTMENT TREATY

ARBITRATION	277
1. INTRODUCTION	277
2. REGIME-BUILDING AND INVESTMENT TREATY ARBITRATION	281
3. THE Q METHOD STUDY ON INVESTMENT TREATY ARBITRATION	284
3.1 The Participants in the Study.....	285
3.2 The Concourse and the Q Set.....	286
3.2.1 Public or Private	287
3.2.2 Investors Versus States.....	288
3.2.3 Arbitrators or Judges	289
3.2.4 Evolution or Devolution	290
3.2.5 Bilateral Versus Multilateral	291
3.2.6 Types of Claims and Claimants	291
3.2.7 Interpretive Scope	292
3.2.8 Substantive Issues.....	293
3.3 The Analysis of the Study.....	294
3.4 An Interpretation of the Results	299
3.4.1 Perspective 1: A Robust International Rule of Law	300
3.4.2 Perspective 2: A Wider Discretion in Favor of State Sovereignty	303
3.4.3 Perspective 3: A Teleological-Doctrinal Focus.....	305
3.4.4 Perspective 4: A Lex Specialis Legal Order	307
3.4.5 Perspective 5: Investment Treaties are the Enemy of the State	309
3.4.6 Perspective 6: Arbitrators are the Problem	310
3.4.7 A Note on Confounded and Not Significant Q Sorts.....	312
3.4.8 Consensus Across Perspectives	313
4. DISCUSSION OF THE RESULTS	320

CHAPTER 9: THE WAY FORWARD..... 322

ANNEX I..... 326

ANNEX II

 368

BIBLIOGRAPHY	376
1. Primary Sources	376
2. Secondary Sources	382

TABLE OF FIGURES

CHAPTER 6: Q METHODOLOGY AND LEGAL ANALYSIS	197
Table 1: Data Matrix for R Factor Analysis	204
Figure 1: Q Sort Data Matrix.....	207
Figure 2: Example of a Deep Q Sort Distribution	221
Figure 3: Example of a Shallow Q Sort Distribution	221
Figure 4: Example of a Free Distribution Q Sort Matrix	221
CHAPTER 8: CONFIGURING FAIRNESS IN INVESTMENT TREATY	
 ARBITRATION	277
Figure 1: Q Sort Configuration	295
Table 1: Q Sort Factors for Q Methodology Study.....	296
ANNEX I	326
Table 1: Socio-Demographic Information of Participants	326
Table 2: List of Statements (Q Set).....	327
Table 3: Defining Q Sorts for All Six Factors	330
Table 4: Correlation Matrix for All Six Factors	330
Table 5: Correlations Between Factors.....	332
Table 6: Factor Arrays for All Six Factors.....	332
Table 7: Consensus Across Factors Matrix (Most to Least)	335
Table 8: Z Scores for Factor 1	338
Table 9: Z Scores for Factor 2.....	341
Table 10: Z Scores for Factor 3.....	344
Table 11: Z Scores for Factor 4.....	347
Table 12: Z Scores for Factor 5.....	351
Table 13: Z Scores for Factor 6.....	354
Table 14: Cumulative Correlation Percentage Among All Q Sorts	357
Table 15: Q Sort Most Correlated with All Other Q Sorts (No. 18)	358
Table 16: Q Sort Least Correlated with All Other Q Sorts (No. 30)	360
Table 17: Crib-Sheet for Factor 1	363
Table 18: Crib-Sheet for Factor 2	364
Table 19: Crib-Sheet for Factor 3	364
Table 20: Crib-Sheet for Factor 4	365
Table 21: Crib-Sheet for Factor 5	365
Table 22: Crib-Sheet for Factor 6	366
ANNEX II	368
Table 1: Q Methodology Study Homepage	368

Table 2: Q Methodology Study Login Page	368
Table 3: Q Methodology Study Socio-Demographic Information Page	369
Table 4: Q Methodology Study Pre-Sort Page	369
Table 5: Q Methodology Study Q Sort Page.....	370
Table 6: Q Methodology Study Q Sort Page (Partially Completed)	371
Table 7: Q Methodology Study Q Sort Page (Completed).....	372
Table 8: Q Methodology Study Exit Interview Page.....	373
Document 1: Invitation for Participation in the Q Method Study	374
Document 2: Confidentiality Agreement for the Q Method Study.....	375

ABSTRACT

Values matter in both legal decision (lawmaking and lawapplying) and discourse (lawshaping and lawinfluencing). Yet, their purported subjectivity means that gaining or improving knowledge about values (whether they be epistemic, legal, moral, ethical, economic, political, cultural, social, or religious) in the context of analytic legal thought and understanding is often said to be at odds with its goal of objectivity. This phenomenon is amplified at the international level where the infusion of seemingly subjective political values by sovereigns, and the decisionmakers to whom they delegate, can, and does, interfere with an idealized and objective rule of law. The discourse on value subjectivity, and its relation to the purpose and function of the law, is particularly apparent in evolving international legal orders such as investment treaty arbitration.

The primary aim of this work is to provide a new method for gaining empirical knowledge about value subjectivity that can help close a weak link in all nonpositivist (value-laden) legal theory: a weakness that has manifest itself as skepticism about the possibility of measuring value objectively enough to permit its incorporation as a necessary component of analytic jurisprudence. This work proposes a theory of configurative fairness for addressing the problem related to the development or evolution of legal regimes, and how legal regimes perceived as subjectively unfair can be remedied. Such a theory accepts the premise that perceptions of fairness matter in directing the way that legal orders develop, and that perceptions of fairness relate to the manner in which values are distributed and maximized in particular legal orders. It is posited that legal orders perceived as fair by their participants are more likely to be endorsed or accepted as legally binding (and are therefore more likely to comply with the processes and outcomes that such laws mandate).

The purpose of a theory of configurative fairness is an attempt to provide a methodological bridge for improving knowledge about value in the context of legal inquiry through the employment of a technique called Q methodology: an epistemological and empirical means for the measurement and mapping of human subjectivity. It is a method that was developed in the early twentieth century by physicist-psychologist William Stephenson: the last research student of the inventor of factor analysis, Charles Spearman. What Stephenson did was to create a way for systematically measuring subjective perspectives, and although not previously used in jurisprudential thought, Q methodology will facilitate a means for the description and evaluation of shared subjectivities. In the context of law generally, and in investment treaty arbitration specifically, these are the subjectivities that manifest themselves as the conflicting perspectives about value that are omnipresent in both communicative lawshaping discourse and authoritative and controlling

lawmaking and lawapplying decision. Knowledge about these shared value subjectivities among participants in investment treaty arbitration will allow the legal analyst to delineate and clarify points of overlapping consensus about the desired distribution of value as they relate to the regime-building issues of evolving legal orders.

The focus for a theory of configurative fairness pertains to the identification of the various value positions that participants hold about a particular legal order and to configure those values, through its rules and principles, in a manner that is acceptable (and perceived as fair) by all of its participants. If such a value consensus can be identified, then particular rules in the legal order can be configured by decisionmakers in a way so as to satisfy participants' shared value understandings. To engage such a theory, a means for identifying shared value subjectivities must be delineated. This work conducts a Q method study on the issues under debate relating to regime-building questions in investment treaty arbitration.

The Q method study asked participants knowledgeable about investment treaty arbitration to rank-order a set of statements about the way that the values embraced by this legal order ought to be configured. The results of the study demonstrate that there is significant overlap about how participants in investment treaty arbitration perceive the desired distribution of values across the regime. The Q method study identified six distinct perspectives that represent shared subjectivities about value in the context of the development of investment treaty arbitration. The Q method study was also able to identify where there is an overlapping consensus about value distribution across the distinct perspectives. It is these areas of overlapping consensus that are most likely to reflect shared value understandings, and it is proposed that it is upon these shared value understandings that the future development of investment treaty arbitration ought to aim.

PREFACE

In April of 2009, José Alvarez delivered a lecture titled *The Evolving BIT*. In that lecture, he stated that perceptions do matter in international legal development – whether or not they are ‘right.’ This simple observation was a statement that caused considerable concern in the international arbitration community with many claiming that there is no place for these kinds of subjective concessions in the law; in fact, it was argued, they are antithetical to the very purpose and function of a rule of law. By no means limited specifically to investment treaty arbitration (or even international law in general), this concern about the inappropriate infusion of subjective thought in objective legal inquiry (especially in theories of interpretation and adjudication) is something that spans all of legal philosophy.

However, such concerns tend to be particularly acute in international law – and especially in the discourse about the scope and applicability of international law. I was initially drawn to legal theory when noticing that most things I had learned in law school about the doctrinal analysis of law could not answer many of the particular regime-building questions facing investment treaty arbitration. I have always been struck by the fact that the discourse about problems in investment treaty arbitration are rarely confined to doctrinal analysis, and even when they are, they are always infused with the underlying worldviews and value perspectives of its proponents and detractors. These values in turn comprise an element of conviction, and are often grounded in ideas of individual and political morality. Living in an era where dominant philosophical theories hold that values are both subjective and relative, claims about objectifying values in the context of law tend to ring hollow. As such, attempting to gain objective knowledge about metavalues such as fairness and legitimacy remains a challenge.

It is this problem and challenge in law that most excites me, and it is from these issues that the theoretical basis of this work springs. The goal of this thesis is not to provide definitive answers about which value perspectives in investment treaty arbitration are right or wrong; rather, the idea is to provide a methodological and theoretical approach for advancing practical knowledge about value in the context of the law. In attempting to measure and gain knowledge about the perspectives, underlying viewpoints, and worldviews that all legal decisionmakers and discourses use to inform and influence the way that they approach legal problems, I hope that such knowledge can assist in delineating points of overlapping consensus about issues of fairness in investment treaty arbitration in a way that the discourse can begin to move from ‘perceptions matter’ to ‘this is how and why the various types of perceptions matter.’

This work seeks to tackle a big subject: it is project that seeks to improve value knowledge in a manner that its integration in nonpositivist theories about law will succeed. This is a topic of debate that the most eminent minds of the philosophical tradition have dedicated their lives to solving; and yet, there remains no definitive solution to its thorniest issues (such as how to provide objectively measurable evidence about the subjectivity of value). It may be a sign of naiveté, arrogance, or both, in taking on such a subject; but it is from this narrative that I nonetheless present my modest contribution. In writing on complex ideas, one always runs the very real risk that their ideas will not be fully developed or that the work will be incomplete at best – and inaccurate at worst. One of the ways that this risk can be mitigated is through the incorporation of the intellectual traditions of previous scholarship: a strategy that I seek to fully employ.

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I came to Dundee to study under Professor Thomas Wälde, and I am forever grateful for the opportunity that he afforded me. Upon his untimely passing in 2008, I have been supported and encouraged by my PhD supervisors, Professor Peter Cameron and Dr. Melaku Desta, over the past four years in ways that have exceeded my expectations. While giving me guidance, they have also given me the freedom and independence to research a PhD on my own terms. I would like to thank Professor Penny Griffith for introducing me to the master of Q methodology, Steven Brown of Kent State University; and in turn I would like to thank Professor Brown for his mentorship over the last few years. I am also thankful to Professor Brown for introducing me to Professor Michael Reisman, Professor Andrew Willard, and Professor Winston Nagan; and for inviting me into the Yale Society for Policy Scientists. I would also like to thank Professor Andrea Björklund for her guidance and support; to Mark Kantor, Sophie Nappert, and Anton Hoenson for their support in garnering participation for my Q method study through the OGEMID listserv; and to Jansen Calamita for highlighting my Q method study at a BIICL conference. I would also like to thank my colleagues in Dundee for great conversations and a supportive environment. First and foremost, to Ana Maria Daza, my housemate, friend, confidant, and eminent expert on the law of expropriation; and a special thank you as well to colleagues Albert Badia, Jing Lee, Vitaliy Pogoretskyy, and Julius Nayak. And finally, to my parents, who have always been unconditional supporters.

DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Dundee or any other institution.

Signed:



Printed: Daniel Behn

Date: 1 September 2013

SIGNED STATEMENT BY SUPERVISOR

I, the supervisor, hereby acknowledge that the conditions of the relevant Ordinance and Regulations have been fulfilled.

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ABBREVIATIONS

AF	Additional Facility
ARB	Arbitration
ASIL	American Society of International Law
BIICL	British Institute for International & Comparative Law
BIT	Bilateral Investment Treaty
BRICs	Brazil, Russia, India, & China
CUP	Cambridge University Press
CIS	Commonwealth of Independent States
DSU	Dispute Settlement Understanding
DTT	Double Taxation Treaty
EC	European Commission
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
FCN	Friendship, Commerce, & Navigation
FDI	Foreign Direct Investment
FET	Fair & Equitable Treatment
FPS	Full Protection & Security
FTA	Free Trade Agreement
GA	General Assembly
GATT	General Agreement on Trade & Tariffs
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
IAs	International Investment Agreements
IL-IR	International Law – International Relations
ILC	International Law Commission
ILM	International Law Materials
ILR	International Law Reports
IISD	International Institute for Sustainable Development
ISSSS	International Society for the Scientific Study of Subjectivity
LDCs	Least Developed Countries
MAI	Multilateral Agreement on Investment
MIT	Massachusetts Institute of Technology
MFN	Most Favored Nation
NAFTA	North American Free Trade Organization
NGO	Nongovernmental Organization
NIEO	New International Economic Order

NT	National Treatment
OECD	Organization for Economic Cooperation & Development
OGEMID	Oil, Gas, Energy, Mining, & Investment Disputes
OJ	Official Journal
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PhD	Doctor of Philosophy
PSNR	Permanent Sovereignty Over Natural Resources
SCC	Stockholm Chamber of Commerce
TNC	Transnational Corporation
UC	University of California
UK	United Kingdom
UN	United Nations
UNCC	United Nations Compensation Commission
UNTS	United Nations Treaty Series
UNCITRAL	United Nations Commission on International Trade Law
UNRIAA	United Nations Reports on International Arbitral Awards
UNCTAD	United Nations Conference on Trade & Development
US	United States of America
WTO	World Trade Organization

CHAPTER 1 AN INTRODUCTION

*Fairness is not a fixed destination; it is a journey or process. Fairness as a destination remains for us always an open question. What matters is the opportunity for discourse: the process and its rules. The issue is not a society's definition of fairness in any particular instance, but rather the openness of the process by which those definitions are reached.*¹

*The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more than the syllogism in determining the rules by which men should be governed.*²

1. INTRODUCTION

This work is about an idea: the idea is that so-called subjective value considerations in both legal decision and legal discourse can be made empirically verifiable through Q methodology. This will permit the conversion of value and evaluation into objective phenomenon called shared subjectivities. These shared subjectivities can thus meet the requirements of social fact, making their incorporation into both positive and nonpositive descriptions of the law possible. Once these shared subjectivities are known, they can be used to configure evolving legal orders in a manner that its participants consider to be fair. As such, this is a work about human values and how individual worldviews, perspectives, and viewpoints influence and motivate the way that legal problems are approached and addressed.³ It is about what types of values are applicable to legal thought and how these values do, or should, shape the way legal decisions are made; and it is about the epistemic possibilities for improving the measurement of subjective value judgments and perspectives in the context of legal inquiry.

Most of jurisprudential thought draws a distinction between legality and morality, questioning when, if ever, the two ought to be intertwined.⁴ However,

¹ Thomas Franck (1995). *Fairness in International Law and Institutions*. Oxford, OUP, p. 83.

² Oliver Wendell Holmes (1881). *The Common Law*. Boston, Little Brown, p. 1.

³ See statement of Percy Spender in his dissenting opinion of the *Temple of Preah Vihear Case* of the International Court of Justice (ICJ) in 1962: “[i]n the nature of things different minds approach problems in different ways. The approach to a legal problem is no exception. What is to be solved will be solved according to the manner of him who solves it.” *Temple of Preah Vihear Case (Cambodia v. Thailand)*. Dissenting Opinion of Percy Spender, ICJ Reports 6 (1962).

⁴ This is the classic separability thesis in conceptual legal positivism. See Jules Coleman (2007). *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*. Oxford Journal of Legal Studies. Vol. 27, p. 581.

the scope of value – and the judgments and the tools that one uses to justify the incorporation of value in law – often extends far beyond the relatively limited value category that one might call moral. Values of all types play a significant role in the way that human beings (and institutions, including states) view, use, shape, and become obligated by, the law. Yet, the purported subjectivity of value inquiry means that objective value knowledge in the context of legal thought often remains elusive as a topic of inquiry.

The purpose of this work is to explore the possibilities for expanding our knowledge (and measurement) of value judgments in the context of both solving legal problems (that is, how specific decisions are made), and in deepening our understanding of the developmental path that legal orders take (that is, how value discourse affects legal development). The entry point of this inquiry will be directed at evolving international legal regimes⁵ and will focus on how subjective value claims, demands, and expectations (perspectives)⁶ influence and motivate the work of both legal decisionmakers (that is, legislators, judges, and arbitrators) and legal discourses (that is, commentators, participants, and scholars).⁷ The basic claim is that subjective perceptions about the right distribution of value in both legal decision and legal discourse plays a critical role in determining the evolutionary path that a particular legal order takes,⁸ and that therefore a theoretical and methodological grounding for this kind of value knowledge can go a long way in enhancing our understanding about the when, what, where, why, and how's of international legal development.⁹

⁵ The particular focus in this work will be on the development of international investment treaty arbitration. However, there are a number of international legal orders that could be considered on a rapid evolutionary track. The method and theory proposed here could be applicable to international intellectual property law, international trade law, international criminal law, or the decisions of the International Court of Justice (ICJ) to name but a few. Almost every area of international law has seen rapid development in the years since the Second World War; in some cases, many regimes of international law have not only evolved during this time, but did not even exist in a legalized form prior to the mid-twentieth century.

⁶ Collectively, these subjectivities are what can be described as perspectives: that is, they are the values that any human being or group of human beings collectively has claims to, makes demands of, or has expectations about.

⁷ The distinction between legal decision and legal discourse claims that the focus of inquiry about the law is differentiated according to the perspective of the individual tasked with the inquiry. Resolving disputes or making binding decisions about the law are a distinct enterprise from that of scholarly inquiry about the law. This work claims that legal theoretical frames should be sensitive to the distinction (it is called the observational standpoint according to the policy-orientated approach of the New Haven school).

⁸ See Eileen Braman (2009). *Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning*. Charlottesville, University of Virginia Press.

⁹ Legal development or evolution in this work are terms used to signal the process of legal decision and discourse over time, and how such processes modify, influence, and improve legal orders in a way that more closely approximates the needs of legally-based human governance structures.

In international law, the perception that political and moral values motivate legal decisions is widespread.¹⁰ There are generally two different modes of inquiry for addressing this problem. The first is to propose that international legal theory ought to restrict itself to that which is identifiably and verifiably legal in nature, and that by focusing inquiry in this way, many of the subjective political and power claims can be purged: a formalistic and idealized form of international law that can transcend politics.¹¹ The second option for legal theory is to acknowledge that different degrees of subjective value judgments form a part of the law and that international legal inquiry mandates that one strive for an improved understanding of such subjective considerations.¹² While the second option may provide the most realistic understanding of international law and the work it is tasked with, it is always hampered theoretically by the fact that subjective value knowledge is so difficult to obtain and articulate objectively.¹³

This work proposes that innovative and creative methodologies for gaining subjective knowledge (that is, the measurement of the underlying perspectives about value that all legal decisionmakers and legal discourses bring to their endeavors) are not only possible, but can act as an addendum to various nonpositivist (and some positivist) orientations in legal theory by providing sound empirical evidence about value claims, demands, and expectations (perspectives) among relevant legal communities. The cognitive turn in psychology over the past half century has advanced methodologies for social scientists trying to measure what has long been considered outside the reach of empirical research: the scientific study of human subjectivity.¹⁴ If one accepts the postmodern view that the things that human beings value are diverse, and that what human beings value is particular to each individual or

¹⁰ However, the depth of inquiry into such a claim tends to stop immediately after it is made.

¹¹ In international law, the positions of Bruno Simma or Gerald Fitzmaurice personify this position. Early codification projects in international law as led by such eminent jurists as Elihu Root can also be seen as endorsing such a view. As Bruno Simma and Andreas Paulus have written, “[l]aw is regarded as a unified system of rule that, according to most variants, emanate from state will. This system of rules is an ‘objective’ reality and needs to be distinguished from law ‘as it should be.’” Bruno Simma & Andreas Paulus (1999). *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*. American Journal of International Law. Vol. 92, pp. 302, 304.

¹² This position is mostly attributable to process-based or goal-orientated visions of international law. This would include political realists and their affinity for power over rule compliance in explaining international law, but such a view generally only has marginal force as a theory about law. More robust theoretical positions supporting this view would include the work of Abram and Antonia Chayes, Thomas Franck, Rosalyn Higgins, Harold Koh, Oona Hathaway, Anne-Marie Slaughter, and the policy-orientated jurisprudence of Harold Lasswell, Myres McDougal, and Michael Reisman.

¹³ This presents particular problems due to the fact that the concept of the Rule of Law is primarily tethered to its ability to be articulated in an objective manner.

¹⁴ Chief among these is Q methodology: it provides a method for exploring cognitive and noncognitive mental processes in a way that can map one’s subjective viewpoint or perspective on a particular topic in relation to viewpoints of others who are similarly positioned.

community (contextualism),¹⁵ then one possibility for gaining value knowledge in this way is not in search of objectivity or universality, but in the search for what can be described as shared subjectivity.¹⁶ That is, can one empirically identify the convergences and divergences in value preferences among individuals and communities to which a particular legal order aims? To satisfy such a hypothesis, this work will develop a theory of configurative fairness contingent on the use of Q methodology: a form of factor analysis aimed at clarifying shared subjective patterns of thought across individuals.¹⁷

In facilitating such an approach to legal and value inquiry, the choice of theoretical orientation is important. In terms of a legal theory that takes value knowledge seriously (forms of nonpositivism),¹⁸ the configurative or policy-orientated jurisprudence (also referred to as the New Haven School) of Harold Lasswell, Myres McDougal, and Michael Reisman presents a good starting point for exploring the ways that methodological advancements in value knowledge and clarification can assist in the justification of a value-laden, nonpositivist jurisprudential outlook.¹⁹ Their jurisprudence is both normative and descriptive in orientation: law is defined as a continuous process of authoritative and controlling decision, and this process is aimed at securing and shaping the explicit goal values needed for the promotion of a public world order of human dignity.²⁰ For policy-orientated jurisprudence, inquiry is focused on the intellectual tasks needed to identify, describe, and clarify what participants in social processes actually value. A project aimed at improving value knowledge in the context of legal inquiry, such as the one that will be

¹⁵ See Melissa Williams & Henry Richardson (2009). *Moral Universalism and Pluralism*. New York, New York University Press.

¹⁶ Shared subjectivity is a term that describes where a group of individuals will hold the same or similar value positions when tasked with evaluating a particular problem, set of choices, or legal position. These shared value subjectivities are not objective in the sense that they derive from the existence of a universal object or entity; rather, they are subjective in that they emanate from the internal mental processes of individuals. While it is possible under such a view to claim that every individual values things differently, empirical evidence tends to demonstrate that there is only a limited number of perspectives on a particular topic and that, in fact, individuals actually share value positions more than they do not. It is the goal of this work to identify such shared subjectivities in relation to a particular legal context.

¹⁷ Steven Brown (1980). *Political Subjectivity: Applications of Q methodology in Political Science*. New Haven, Yale University Press; Bruce McKeown & Dan Thomas (1993). *Q Methodology: Quantitative Applications in the Social Sciences*. London, Sage.

¹⁸ The distinction between general positivist and nonpositivist orientations is made primarily to identify the different ways that the law is conceptualized. At the center of such a distinction is whether law and morality can be separated (positivists say no, nonpositivists say yes). While the positivist-nonpositivist divide is quite crude, it helps in making the distinction between those theories that believe a value-free description about the nature of law is possible (positivists) and those who do not (nonpositivists). Typically, nonpositivist thought includes all of the natural law schools, the legal realist schools, and the process-based schools of jurisprudence.

¹⁹ Harold Lasswell & Myres McDougal (1992). *Jurisprudence for a Free Society: Studies in Law, Science, and Policy. Volume I and II*. New Haven, New Haven Press; Michael Reisman (1999). *Theory About Law: Jurisprudence for a Free Society*. Yale Law Journal. Vol. 108, p. 935.

²⁰ Michael Reisman (1992). *A View from the New Haven School of International Law*. American Society of International Law Proceedings. Vol. 86, p. 118.

described in this work, may provide a useful addendum to nonpositivist frames or inquiry generally, and the New Haven school specifically.²¹

The delineation of shared value perspectives (subjectivities) in the context of legal inquiry will be facilitated through the use of Q methodology. The various value typologies that emerge from such an empirical investigation will then be applied to a theory of configurative fairness for evolving legal orders. A theory of configurative fairness is a normative theory about law derived from the framework of inquiry found in both policy-orientated jurisprudence and Rawlsian²² and neo-Rawlsian²³ theories about justice. The specific task of a theory of configurative fairness is to identify shared value subjectivities among participants in a particular legal context and to use this knowledge as a foundation for justifying the configuration of a legal order whose legal rules, principles, and norms would be considered fair (subjectively just)²⁴ by both its lawgivers and lawtakers.

Configurative fairness is thus a term of art that connotes the value configuration of a particular legal order according to what its participants would subjectively endorse as fair. Fairness in this context is a metavalue that describes the ‘right’ distribution and configuration of lesser values in a particular legal order. A theory of configurative fairness is a theory of justice that claims – despite deep skepticism about the objectivity of justice – fairness is possible if the rules, principles, and norms that develop under such a system of law are expressive and inclusive of participants’ shared value expectations. The specific subject-matter for testing such a theory of configurative fairness will be aimed at the evolving international legal order of investment treaty arbitration. This is a legal order that is currently on an evolutionary trajectory, and because of its decentralized development it has been the subject of protracted and continual debate about how its values ought to be configured.²⁵

²¹ Most process-based jurisprudential outlooks see law as aimed at a purpose or function. This goal or aim of jurisprudence is to promote a means for ordering human interaction; and as such, the law is not an end in itself, but is a facilitator (means) to a purposive end. In this way, most process-based schools of thought do not see law as an end in itself, but as an instrument for achieving a goal (which in the case of the New Haven School is the shaping and promotion of the values of human dignity within the structures of public order).

²² John Rawls (1971). *A Theory of Justice*. Cambridge, Harvard University Press; John Rawls & Erin Kelly (2001). *Justice as Fairness: A Restatement*. Cambridge, Harvard University Press.

²³ Neo-Rawlsian thinkers might include the work of economist-philosopher Amartya Sen, legal philosopher Ronald Dworkin, and moral philosopher Christine Korsgaard.

²⁴ Subjective justice as fairness is a claim that despite absolute ontological truth about what is universally just, the idea of fairness is a determinable value according to what members of a relevant legal community would agree to as fair (both substantively and procedurally).

²⁵ However, a theory of configurative fairness and the proposed utility of Q methodology in jurisprudential thought are conceived as general approaches that could be applicable to all types of legal orders, both domestic and international. For example, it is possible for future Q method studies to focus on international human rights law, international environmental law, international humanitarian law, or international criminal law.

This work conducts a Q method study on the issues under debate relating to regime-building questions in investment treaty arbitration. The Q method study asked participants knowledgeable about investment treaty arbitration to rank-order a set of statements about the way that the values in the regime ought to be configured. The results of the study demonstrate that there is significant overlap about how participants in investment treaty arbitration perceive the regime. The Q method study identified six distinct perspectives that represent shared subjectivities about value in the context of the development of investment treaty arbitration. The Q method study was also able to identify where there is an overlapping consensus about value distribution across the distinct perspectives. It is these areas of overlapping consensus that are most likely to reflect shared value understandings, and it is proposed that it is upon these shared value understandings that the future development of investment treaty arbitration ought to aim. The interpretation of the results of the Q method study will be discussed in detail in Chapter 8.

2. A STARTING POINT

Values matter in both legal decision (that is, lawmaking, lawadjudicating, and lawinterpreting) and legal discourse (that is, lawshaping and lawinfluencing). Yet, their purported subjectivity means that gaining knowledge about all types of value²⁶ in the context of legal thought and understanding is often said to be at odds with the law's goal of objectivity. This difficulty in clarifying the proper place for value inquiry in legal thought is broadly attributable to two major developments in twentieth century philosophical thought. The first development is traceable to the popularity of the conceptual theory of legal positivism, and its two-fold theses on the separability of law and morality and of pedigree-based legal validity. The second development is traceable to postmodernism in the social sciences more generally, whereby the epistemology of value has been greatly influenced by concepts of relativity, contextuality, and plurality. While these developments are primarily geared at diminishing the possibility of objective moral knowledge,²⁷ they have also

²⁶ These include epistemic, cognitive, legal, economic, moral, ethical, political, cultural, social, or religious values. The term value as used in this word denotes a very broad definition. Values pertain to all of the things that conscious beings value. This includes political and moral values about how one ought to treat others, ethical values about how one is to live a good life, and all of the things that one values in constructing and understanding a vision of the world and her place in it. When speaking of values as a noun, it is referring to anything that human beings hold to be good or valuable. When speaking of values as a verb, it is a reference to the tools human beings use to evaluate, judge, and justify ideas, subjects, and objects.

²⁷ The debate about the metaphysical truth of morality is both diverse and divisive. Some moral thinkers believe that the only entities that should constitute moral inquiry are those aspects of morality that are identifiable as 'real' entities that can be shown to exist naturally in some form. Since there are very few philosophers who hold that such knowledge is possible, the limitations for moral knowledge under such a view are profoundly bleak. However, some moral philosophers believe that moral knowledge is objectively knowable as a product of a priori

influenced value inquiry more broadly, often acting as thought-stoppers when the topic of value knowledge is engaged.²⁸

This phenomenon is amplified at the international level where the infusion of subjective political values (even naked power) by sovereigns (political realism) can, and does, interfere with an idealized and objective rule of law (legal idealism). The debate on the appropriate level of value subjectivity (precepts-principles-policies-politics-power)²⁹ that should be permitted to influence international legal decision and discourse remains a core issue in delineating a clear theoretical understanding about international law both analytically and normatively. Theories about international law have oscillated between its nonexistence (power realism) at one extreme to a utopian vision of a universally applicable and respected rule of law at the other (legal idealism).³⁰ While these extremes are likely to be unhelpful in determining the scope and relevance of international law as it stands today, it is noteworthy to observe that they both attribute value a central role: one is claiming the supremacy of power in a hierarchy of values (power realism) and the other is claiming the supremacy of order (legal idealism). With that said, mainstream international legal thought today can roughly be divided along two paths: positivism (including adjudicatory theories such as legal formalism)³¹ and nonpositivism (including adjudicatory theories such as legal realism).³² However, these theories about law contain a common thread throughout: all explanatory

reason. While there are significant problems with such a traditional Kantian metaphysics about morality, there is a strong claim that values are objectifiable as entities that exists in the human mind (either as a product of reason or emotion).

²⁸ Hilary Putnam (2004). *The Collapse of the Fact-Value Dichotomy and Other Essays*. Cambridge, Harvard University Press, p. 44.

²⁹ These five P's of subjectivity represent the degree spectrum that is often discussed in legal thought. At the one end are precepts. These primarily constitute cognitive values or epistemic values (such as coherence, simplicity, predictability, or reliability) that are used to gain knowledge and understand particular ideas or objects. Most conceptual positivists (and logical positivists too) claim that epistemic values are nonmoral values and thus permissible in framing inquiry and designing theories about the law. Principles are noncodified norms that inform reasoning. Ronald Dworkin, who famously attempts to form a bridge between positivist and nonpositivist thought, is compelled to believe that principles (as rooted in morality) also form a part of the law. Policies can be described as a level of nonarbitrary subjectivity in theories about the law that claim the law should be used instrumentally to achieve the goal values of a particular community. Politics and power form the far end of the spectrum and are identifiable as the most negative inferences about subjectivity: arbitrary, capricious, and often abusive behaviors used to further the interests of a particular party or state.

³⁰ See Martti Koskeniemi (2006). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge, CUP.

³¹ Positivism as a conceptual theory can be divided into inclusive (soft) or exclusive (hard) positivism. While not a conceptual theory, most positivists are likely to view adjudicative theories in formalistic terms. The exemplar of soft positivism is attributable to HLA Hart, while the chief proponent of a hard positivism is that of legal philosopher Joseph Raz.

³² Nonpositivism as a conceptual theory is primarily aimed at various natural law (transcendental) theories about law. However, they also often include the process-based schools of jurisprudence and Ronald Dworkin's interpretivism. Adjudicatively, most nonpositivists are drawn to some form of legal realism in looking to explain how legal decisions are actually made.

theories of law can be categorized by the degree of subjective value knowledge that ought to be permitted in describing what the law is.

Positivist inquiry mandates a separation of law from moral value, creating theories about law that focus primarily on the identification of legality as defined by particular criteria (that is, that which has been posited). A descriptive positivist or analytic jurisprudence aims at understanding the concept of law and legality.³³ Conceptual positivists are focused on deriving the essence or nature of law. They are trying to figure out what the concept of the law is for the purpose of being able to identify and verify legality. However, this is a quite different focus from trying to understand how legal decisions (judgments) should be made, or in determining what the content of the law is or should be.

The unfortunate problem is that an unsophisticated legal positivism tries to convert the idea of a naturalized or objective set of criteria for the concept of the law into a similar set of criteria for understanding legal content and legal decision, which often results – adjudicatively – in crude forms of mechanical legal formalism. While it is debatable whether the project of a completely value-free, objective, and naturalized theory about the content-independence of law is possible, it is at least plausible.³⁴ However, an objective or naturalized theory for understanding legal content and legal decision fails almost immediately. Basic empirical evidence about content and decision quickly demonstrates that it is infused with value claims that are only rarely amenable to exact scientific and empirical verification (what HLA Hart calls ‘social facts’).³⁵

Nonpositivist theories about law reject the positivist ideal of value-free legal understanding, and hold that the purpose and function of law – and especially the particulars of legal content and legal decision – are not only inseparably tied to value, but are a necessary component of it. This view does not negate positivism as a sound conceptual theory; it merely holds that it is incomplete: all law and legality cannot be understood in purely positivistic terms. However, the nonpositive theory employed as the jurisprudential basis for a theory of configurative fairness is one that is ontologically agnostic about the concept of the law: that is, no claims are being made as to whether a pure conceptual theory about law can be true. This is not to say that both positivist and nonpositivist conceptual theories about the nature or essence of the law do not

³³ Analytic jurisprudence is a conceptual theory focused on the existence and nature of the law. Therefore, it is not orientated towards understanding the content of the law (although Hartian positivism is) as it is (descriptive) or as it should be (normative); nor is it orientated towards an understanding of adjudication or decision.

³⁴ See Matthew Kramer (2007). *Objectivity and the Rule of Law*. Cambridge, CUP.

³⁵ Social facts are a term in Hartian legal positivism used to denote the outside boundaries of legal content. Social facts are those collective behaviors of social interaction that are empirically observable. Thoughts to be found in the consciousness of individuals are not social facts according to such a description.

exist. They do. However, answers to the truth existence of the concept of law are not required in determining what content users of a legal order would endorse as fair.³⁶

Therefore, the use of the word theory in this work will aim at a practical jurisprudence on the epistemology of law and value. The focus of such inquiry aims at the following: how does one gain knowledge about law and value in a manner that can assist in explaining and evaluating how legal orders ought to develop? A nonpositivist approach of this type will reject sharp dichotomies between law and justice, instead choosing to focus how the interrelation of these two ideas presents the closest possibility for an improved understanding of how legal orders (especially international ones) actually develop.

Throughout the history of legal thought, one of the major impediments to nonpositivist orientations – especially those of the historicist, realist, and natural law schools – is the question of value objectivity and whether moral or ethical claims about what is good and right are objectively knowable. The philosophic work in this area runs the gamut: from values existing as mind-independent entities (moral realism) to values being nothing more than nonentities of emotive expressions (necognitive sentimentalism). With the exception of moral realism, which claims that moral values are truthapt ontologically, all value theories are responding to two claims against it: 1) values are incapable of being expressible as true or false propositions, and 2) value are incapable of identification as empirically verifiable objects. In mainstream thought, these two claims about value means that value knowledge is a subjective enterprise incapable of being objectively known in the scientific sense, or as some claim, in any sense. These skeptics claim that the idea is ‘nonsense upon stilts.’³⁷ For most legal theories, all of which pride themselves in delivering an objective account of legal phenomenon, the problem of subjective knowledge is always lurking in the background. If true, then what exactly is there to know about value, and is there any possibility for achieving value knowledge that even remotely resembles a scientifically observable fact?

³⁶ Such questions go to the deep conceptual metalegal and ontological issues in law that pertain to the essence or nature of the law as described in the previous paragraph. The classic way to describe these ontological issues is whether or not Nazi law was law. Generally speaking, positivist theory will claim that it was law, but bad law. Nonpositivist theory will claim that values such as justness must be considered in determining whether a law is law; and in the case of Nazi law, so the theory goes, its wickedness negates its legalness.

³⁷ “That which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.” Jeremy Bentham (1792). ‘Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution,’ republished in John Bowring (1843). *The Works of Jeremy Bentham, Volume II*. Edinburgh, William Tait.

One possibility for advancing value knowledge in legal thought is through the use of Q methodology. By providing a methodological bridge for gaining and improving knowledge about value in the context of nonpositivist legal inquiry, Q methodology will provide a means for systematically and empirically measuring subjective perspectives. Q methodology is an empirical method that blends quantitative and qualitative experimental structures for measuring human subjectivity. It is a method that was developed in the early twentieth century by physicist-psychologist William Stephenson: the last research student of the inventor of factor analysis, Charles Spearman. What Stephenson did was to create a method for systematically measuring subjective perspectives; and although not previously used in jurisprudential thought, Q methodology will facilitate a means for the description and evaluation of shared subjectivities about value.³⁸

In the context of law, value subjectivities manifest themselves as the convergent and divergent perspectives that are omnipresent in both communicative lawshaping and lawinfluencing discourse and authoritative and controlling lawmaking and lawapplying decision. It is claimed that knowledge about these shared value subjectivities is possible through the use of Q methodology and that such knowledge will be useful in assisting both decisionmakers and discourses in delineating and clarify points of overlapping consensus³⁹ about the desired value distribution among participants in a particular legal context. This information about shared values can then be used to configure a legal order whose rules, principles, and procedures are considered fair by its users.

The theoretical components of this work will focus on the methodological objectification of values (as shared subjectivities) in a manner that can be sufficiently relied on in legal analysis. The starting point for such inquiry rejects the idea about the dichotomy between fact and value, instead holding that the structure of fact and value are entangled: one requires the other.⁴⁰ However, if one claims that knowledge about values and knowledge about facts are distinct enterprises, and that only facts can be scientifically and objectively analyzed and described, then knowledge about value becomes irrelevant to scientific inquiry. This claim has always presented problems in philosophic inquiry about how one comes to know facts and how one comes to know values. In the context of law specifically, and the social sciences generally, the problem often manifests as a limitation: by ignoring knowledge about values in understanding the complexity of social processes because they cannot always be objectively described or analyzed, the researcher or analyst

³⁸ William Stephenson (1953). *The Study of Behavior: Q-Technique and Its Methodology*. Chicago, University of Chicago Press.

³⁹ John Rawls (1987). *The Idea of an Overlapping Consensus*. Oxford Journal of Legal Studies. Vol. 7, p. 1.

⁴⁰ Putnam, supra note 28; Jürgen Habermas (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg. Cambridge, MIT Press.

potentially leaves large swaths of critical knowledge uncovered. Therefore, the goal of this work is to provide a method for looking at values in a way that can bring these often unobservable phenomena of the subjective mind to the surface. This will be done by providing a method (Q methodology, specifically) for learning about shared subjectivity through the empirical objectification of subjective value knowledge.⁴¹

The practical approach of this work will focus on the metavalue of fairness in the context of how the content of evolving international legal orders ought to be configured. This idea will be built primarily on the framework for legal inquiry as developed in the policy-orientated jurisprudence, and modified by advances in moral, psychological, and political philosophy (especially through the work of Rawlsian theorists). The result will be to propose a theory of configurative fairness that is based on the determination of shared value subjectivities. The purpose of such inquiry is built on the following hypothesis: a concept about the content of law, as a legitimate and dynamic process of authoritative and controlling decision, presupposes that the law is perceived as fair by the community members to which it is directed, and that the fairness of a particular legal order is defined as one that is configured around shared community or societal subjectivities about the agreed distribution of values in a particular context.

While this claim may appear too abstract for application, its importance lies in the idea of achieving fairness, in the context of law, as inextricably linked to knowledge about the configuration of value and how individuals perceive it. If correct, this means that legal orders rejoicing in the application of logically derived, value-neutral rules can only achieve fairness, if ever, by accident. Fairness is a value, and therefore the achievement of fairness (subjective justice)⁴² requires value knowledge. As such, if one claims that perceptions and perspectives on fairness are an important consideration in the evolutionary change of legitimate legal orders, then a theory for configuring fairness around converging subjective value perspectives could prove useful in grounding future decision in controversial areas of legal development.

3. TWO PRELIMINARY DISTINCTIONS

In understanding the exact focus of inquiry, there are two distinctions that are critical for the type of theory about law and value that is being proposed. The first distinction is between epistemology and ontology, and the second

⁴¹ Put slightly differently, the goal is to identify subjective value knowledge in a way that qualifies it as a Hartian social fact.

⁴² Subjective justice (fairness) can be seen as a means of distinguishing 'right' values from mere self-interested preferences. In other words, it is a claim that, while subjective to the self, fairness can be articulated objectively as shared value perspectives.

distinction is between the internal and the external. While both of these conceptual distinctions are often implicitly or explicitly discussed in legal theory, they can quickly become confused and muddled. Since these conceptual distinctions circumscribe the intellectual boundaries for advancing a theory about value knowledge in the context of law, clarity about these terms is important. For the first distinction, the importance for understanding value in the context of law lies in the *type of claims* being made: are they ontological (metaphysical) claims or epistemological claims about value?

Ontological questions about value look to the truth claims about value: that is, do values exist – and if they do – what is their nature or essence? Epistemological questions about value make claims about how knowledge about value is gained: that is, what is valued, how can one understand these things called values, and what is there to know about them? The importance of this distinction in the context of value in legal thought is that regardless of whether absolute truth claims about value are possible, knowledge about value can be gained or improved. The claim is that despite their subjectivity, values (as a product of the deliberating mind) can be the target of epistemological inquiry, even if ontological claims about value remain mired in skepticism.⁴³

For the second distinction, the importance for understanding value in the context of law lies in the *type of inquiry* being made: that is, what is the focus of the inquiry and what is the observational standpoint or perspective of the individual making the observation? What is it when one says something like the ‘internal point of view’ or ‘external to the law?’ The delineation of this type of inquiry can be configured in a variety of ways that will have profound effects on particular understandings about the law. For example, such inquiry can focus on the observational standpoint of the inquirer – such as the internal decisionmaker or the external discourser or scholar, or it can focus on the nature of inquiry – such as internal deliberations of the mind or the external observations of the world.

The importance of the distinction between internal and external inquiry in the context of legal and value knowledge centers on where particular forms of knowledge emanate. The objectivity of law is claimed when a determination of the law is identifiable as an object external to the particular subjectivities of the lawgiver or lawtaker (this is the conceptual definition of the Rule of Law). The subjectivity of value is claimed when a determination of value is identifiable as a state of mind internal to a particular individual. Taken one step further, the question for legal inquiry is whether value subjectivity can or should be internal to our understanding of the law itself, or should it remain a

⁴³ In other words, the truthaptness of a proposition is a different enterprise from that of empirically documenting normative claims. This is a common distinction in most political and moral theory.

consideration external to the scope of legal knowledge? Both the epistemological-ontological and the internal-external distinction help clarify the starting point for inquiry about value in law, and it is from these two sets of distinctions that knowledge about shared subjectivities will be pursued.

3.1 Value Epistemology and Value Ontology

When speaking about law, it is frequently the case that questions of normativity – such as legitimacy, justice, and fairness – are sheered away from questions of descriptive analysis. This is the traditional distinction made between analytic and normative jurisprudence. In the realm of legal knowledge, this sharp divide between what is and what ought to be is partially the result of the success and dominance of legal positivism over the past few centuries. Most attempts at the analytical integration of value and law are quickly labeled foolish because, as legal positivists claim, a description of what makes law law is not value contingent: it has no moral compass – it is a scientifically factual enterprise. Either it contains the properties of legalness or it does not.

For the positivist, this determination of what makes law law can be done without recourse to value knowledge. However, for most nonpositivists, the legalness of a particular entity is not always determinable without some reference to value, and even when the legality of a particular entity is factually determinable, questions about how such legal content ought to be applied or interpreted often requires reference to value. This is because law serves a purpose – it provides a service, and that service is to guide and regulate social behavior. In this way, the content of legal norms – and how this content is applied and interpreted – will always require an element of value inquiry in determining whether or not they are performing their desired service. However, if such value inquiry is subjective and commonly unobservable, then gaining knowledge about value in a manner that is objective enough to satisfy the objectivity mandate in legal knowledge – as demanded by positivist thought – can be a challenge.

In proposing a method for improving knowledge about value in the context of law, the objectivity-subjectivity distinction and the fact-value distinction are of central concern. While there is considerable difficulty in sustaining a clean division between objectivity and subjectivity in the context of legal knowledge, there remains a widespread consensus in contemporary thought holding that law is objective and value is subjective. What exactly does this mean? Is this a claim about law *as* objective and value *as* subjective, or is it a claim about the objectivity *of* law and the subjectivity *of* value? This simple dissection of the terminology exposes very different conceptual uses of objectivity and subjectivity. For purposes of this work, two critical distinctions about

objectivity and subjectivity are being made here. Broadly speaking, the first distinction relates to the epistemology of law and value, and the second relates to the ontology of law and value. The first aspect relates to how one gains knowledge about both the concept and content of law and value (epistemological questions), while the second relates to what there is to know about the existence (truth claims) of concepts about law and value (ontological questions).

The focus of this work is on the epistemological aspects of value. That is, can one gain knowledge about value despite its purported subjectivity? Does its subjectivity mean that it is impossible to gain knowledge about it, or is such knowledge just difficult to obtain? If it is the latter, then it is likely that the possibility of gaining value knowledge has been conflated with the practicality of gaining value knowledge. Along these lines, it is often the case that the objectivity or subjectivity of a particular claim is based on what is empirically observable and what is empirically unobservable. Some aspects of value are observable and one tends to call them objective or naturalized phenomena (what sociologists call social facts). Some aspects of value are less observable or unobservable and one tends to call these subjective phenomena (conscious and unconscious thoughts and feelings). Yet, this really says nothing about value objectivity or subjectivity in either the ontological or epistemological sense. Rather, it is something much less sophisticated. It is merely acknowledging the difficulty in the measurement of value subjectivity.

The practicality of knowing value in the context of legal decision and discourse should not foreclose the idea that such knowledge is possible. Whether value exists ‘out there’ externally in the world or as the internal deliberation of the reasoning or feeling mind, answers to questions of value are possible. Objective and infallible truth in scientific inquiry is never required: there are many mysteries that remain beyond the grasp of human knowledge. Yet, not surprisingly, scientists continue to search for answers. While an infallible and absolute determination of the exact contents of value may be an impractical aim, the reigning skepticism about value knowledge in the context of law is largely unhelpful.

The second question alluded to in the proceeding paragraphs can be framed ontologically as: is there truth about value, and is it objective or subjective? This type of ontological inquiry often relates to discourse about the concept and structure of value. Is value natural, nonmaterial, emotive, or cognitive?⁴⁴

⁴⁴ These are questions relating to the essence of value and where they may exist, if at all. Moral realist theories about value claim that values are identifiable as mind-independent entities. Cognitive theories about value claim that values exist as a product of human reason and thought, while emotive or sentimentalist theories about value (noncognitive) also claim that value is internal to the self, but that what one values is a product of desire and feeling – not rational thought or reason.

Is value unitary, plural, universal, or relative?⁴⁵ The ontological claims about the objectivity (that is, universal or unitary, and natural or cognitive) or subjectivity (that is, relative or plural, and nonmaterial or noncognitive) of value – and the resulting truth claims made about these concepts – are questions that have, and continue to, occupy the greatest minds of human history. These questions are of central concern in the context of both theories about law and theories about justice, and yet definitive answers to these ontological questions remain elusive.

The epistemological questions about the objectivity and subjectivity of value knowledge are a bit less problematic. Theories that attempt to provide ontological truth about value are distinct from theories that attempt epistemological inquiry and clarity about value. Epistemically speaking, knowledge about value can be divided into two categories: 1) subjective, which are internal to the self and sometimes unobservable (even unconscious) aspects of value knowledge that relate to states of the mind, and 2) objective, which are external to the self and often observable behavior aspects of value knowledge that are empirically verifiable from experience (social fact).

3.2 The Internal and the External

The second important preliminary inquiry referenced above relates to how subjective value knowledge can be incorporated into the analysis and understanding of both the internal components of law and value, and the external components of law and value. As the major thrust of this work is to improve understanding on how the subjective worldviews, perspectives, and value preferences of individuals motivate and influence the way that legal problems are approached, it is useful to clarify the focus of inquiry that can produce guidance for such a task.

In order to gain knowledge about how international legal orders evolve and the role that value perspectives play in the evolutionary path that such legal orders take, inquiry will focus on the following two considerations: 1) the role of the scholarly observer discoursing about the law from the outside and how such discourse can influence and motivate the way that the law develops, and 2) the role of subjective value perspectives as internal deliberations of the mind (often unconscious and unobservable phenomena) as distinct from the

⁴⁵ These are questions relating to the structure of value and how they may exist, if at all. Unitary theories about value claim that the only way to understand value is a single unifying concept from which all other values flow. A pluralistic theory about value claims that values are often incommensurate with each other; and therefore, they cannot be explained as a unity. The classic example of this claim is between the political values of liberty and equality, and how, if ever, they can be reconciled. Universal and relative theories about value connote the difference in conceptualizing value as applicable across all conscious beings (universally true) or as relative to a particular context (relatively true).

objective value perspectives that are external to the self and expressible as empirically observable behavior (social fact). The purpose of these foci are to claim that the external discourse about the law plays a critical role in the shaping of authoritative and controlling decision, and that social fact insufficiently represents what individuals actually value.⁴⁶

As such, the terms internality and externality will be used to differentiate between four ideas. The first idea relates to subjectivity as internal to the self and objectivity as external to the self. The second concept relates to the separation of legal inquiry into distinct law jobs that are internal and external to the law itself: internal legal decision (making and applying authoritative and controlling decisions) and external legal discourse (lawshaping and lawinfluencing discourse about legal decision as viewed externally from the decision process itself). The third concepts relates to how knowledge about the law is categorized and integrated: internal considerations include the relationship between different legal orders (such as the relationship between domestic law and international law, for example) and external considerations include the relationship between different legal schools of thought and extralegal disciplines (such as the relationship between sociology and the law, for example). The final distinction relates to the internal and external point of view in Hartian positivism: an important idea that forms the basis of his theory on rule acceptance. All of these distinctions are relevant and important when trying to gain knowledge about value in the context of legal thought.

For the first conception, inquiry relates to knowledge internal to the self and knowledge external to the self. Doctrinal law acknowledges the difficulty in gaining knowledge internal to the self, such as subjective states of the mind (what might be called internal subjectivities) – whether conscious or unconscious – and therefore focuses on that which is external to the self and objectively observable in the world: legal doctrine, social fact, or historical tradition (what might be called external objectivities). This focus on objective fact is an important tenet of all legal theory, but especially legal positivism in all its iterations. One of the key aspects of external objectivity is an attempt in legal theory to base analysis of the law on a methodology that is confined to naturalized and observable states of the world.⁴⁷ However, in many cases, there are subjective states of the mind that influence and affect objective legal inquiry. It is this relationship about the interplay between external objectivities and internal subjectivities that is the focus of this work.

The second conceptualization of internal and external is noticeably different. Accordingly, in the context of law, there are two ways in which subjective

⁴⁶ This is an idea akin to the requirement of both state practice (social fact) and *opinio juris* (subjective and internal considerations about value that yield as sense of obligation) in constituting customary international law.

⁴⁷ See Brian Leiter (2007). *Naturalizing Jurisprudence*. Oxford, OUP.

perspectives manifest themselves: internal to the law and external to the law. The internal aspect of subjectivity relates to value perspectives of lawmakers and lawappliers: that is, the subjective and often externally unobservable states of mind that individual decisionmakers employ when reasoning and making judgments about the law.⁴⁸ While the relationship of value and law in the internal context will focus on decisionmaker subjectivity, the relationship of value and law in the external context focuses on the subjectivity of community or societal discourse: that is, the universe of perspectives about value that influence and guide the social process and lawshaping discourse over time. In looking to understand how subjective value perspectives influence and shape the law, this distinction between decision inquiry and discourse inquiry will be sustained in the context of this work.

While the first and second concepts of the internal and external form base distinctions that are critical to this work, the third and fourth concepts are slightly tangential – but are important nonetheless. The third concept focuses on the way that law is conceptualized as an overarching idea that governs specific areas of human behavior. That is, within both legal decision and discourse, there is an ongoing debate about how the law as a self-contained concept interacts with the larger world. Within these debates, which come largely from nonpositivist orientations about the law, there are hermeneutic issues about how to incorporate knowledge about social phenomena into our understanding about the way that the law works in the larger social context.⁴⁹ Positivist orientations on the other hand tend to eschew such considerations and limit inquiry about the content of law to social facts: a process that can include nonlegal disciplines only if they are contained within posited law.

The fourth and final idea about internality and externality in the law relates to a particular conception employed by Hart. Called the internal point of view in Hartian legal positivism, this concept hinges on the way that rule acceptance is internalized by its subjects.⁵⁰ It is an idea that is suspiciously subjective in nature, and yet it is a central feature in this descriptive theory about what makes law law. According to Hart, there is something about the nature of law (probably its authority) that causes individuals to internalize externally observable social fact and to accept these facts (legal rules) as part of their internal makeup. According to this view, subjects – as seen from the internal point of view – accept the obligation of law because it is law, not because of its

⁴⁸ This reference to law includes the task of the decisionmaker in both the making of law, and in the adjudication of disputes arising under the law.

⁴⁹ Such as the way that sociological, psychological, economic, and political disciplines can inform our understanding of what the law is or should be. However, even this categorization can be further parsed into another set of internal-external distinctions when the relationship between different specialties in law are being discoursed. An example of this might be the way that principles of environmental law are analyzed in the context of human rights law or trade law or investment law.

⁵⁰ See Dennis Patterson (1999). *Explicating the Internal Point of View*. Southern Methodist University Law Review. Vol. 52, p. 67.

moral legitimacy or authority, or because of the threat of law's coercion-backed sanction. For Hart, this means that legal rules impose an obligation to accept the law in a manner that is internal to the self. The external point of view, on the other hand, is the set of rules that cannot bind the subject because they remain as social facts external to the subject's constitution.

The importance of Hart's internal point of view for value inquiry in the context of law is that it appears to be contingent on an evaluative component that requires individuals to accept a rule as legally obligatory. In the context of a theory of configurative fairness, the internal point of view is an important idea for the evaluation of what compels people (or states) to obey the law. For Hart, the sense of legal obligation comes from the fact that a primary rule is derived from a secondary rule such as the rule of recognition.⁵¹ However, what if the rule does not derive from a rule of recognition? How then does one accept the rule as binding from the internal point of view?

An example of such a rule would be to look at Ronald Dworkin's favorite legal concept: the legal principle.⁵² In some cases, a judge or adjudicator feels bound to apply a legal principle even though no rule of recognition can identify it. Where does such a sense of obligation derive? An answer may come from research in social psychology holding that why one obeys the law is rooted in the way one's mind perceives that law or rule to be just: for example, the idea that a rule is perceived as substantively fair, or at a minimum, it is perceived as part of legitimate process (that is, procedurally fair).⁵³ Such a conceptualization of rule acceptance expands Hart's internal point of view to include senses of fairness or justice in evaluating whether the law obligates. If true, such insight provides a significant empirical foundation for the idea that how one perceives the obligatory nature of law as inescapably intertwined with value (sometimes even moral value).

4. THE VALUE OF METHOD AND THEORY

The goal of obtaining sufficiently objective knowledge about subjective value may appear oxymoronic. And yet, it does seem fairly routine and commonplace

⁵¹ Julie Dickson (2007). *Is the Rule of Recognition Really a Conventional Rule?* Oxford Journal of Legal Studies. Vol. 27, p. 373; see also HLA Hart [1961](1997). *The Concept of Law*, edited by Joseph Raz. Oxford, Clarendon Press.

⁵² See Ronald Dworkin (1986). *Law's Empire*. Cambridge, Belknap Press.

⁵³ "If people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules. They will feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law. This normative commitment can involve personal morality or legitimacy. Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior." Tom Tyler (1990). *Why People Obey the Law*. Princeton, Princeton University Press, p. 4.

for discussions of universal human rights to hold sway in both popular and academic culture. What can one make of such claims in the context of value knowledge? Where do these universal human rights come from and how are they to be identified? Are these rights universal in the sense that every conscious being would agree to such rights (subjectively just in the rational sense of Rawlsian and neo-Kantian thought), or is there a mind-independent entity that exists universally that one can observe as a human right (objectively just)?

The answer to this question remains unproven in a scientific sense, but demonstrates why theoretical design and focus of inquiry are important to obtaining a realistic understanding of the social processes that is called law. In positivist thought, it does not matter where human rights come from: so long as they have been posited in a legally valid form. For them, this is enough. For almost every strain of nonpositivist thought however, this is intellectually unsatisfying inquiry. If the law has a purpose and that purpose is to guide the manifest of human interaction in the time-space continuum, then a deeper knowledge about what human beings value (and what rights they have) is needed to achieve such a purpose.

4.1 The New Haven School and Q Methodology

The New Haven School developed in the mid-twentieth century as a reaction to both political and legal realism in domestic and international jurisprudential frames. Its founders claimed that an understanding of the process of authoritative and controlling decision as a constitutive description of law was unidentifiable when viewed through the prism of power realism. Power-based or *political realism* places all of its analytical focus on the concept of control and interests, leaving the equally necessary component of legal authority and legitimacy underevaluated. Likewise, New Haven scholars found that *legal idealism* in its various incarnations limited legal understanding by overemphasizing perspectives at the expense of operations. One of the main underlying tenets of the New Haven School is to claim that a comprehensive method of inquiry into the law requires a theory about law that can balance its emphasis on authority and control, and on perspectives and operations.⁵⁴ In formulating inquiry in this way, one could say that power matters in international law – but so does authority; and that state practice (operations) matters in international law – but so does perspective.

At the center of such a comprehensive map of legal understanding is the explicit postulation of the goal values to which a world public order of human dignity should aim. In this way, the New Haven School incorporates a

⁵⁴ See Lasswell & McDougal, *supra* note 19.

normative and prescriptive orientation in its formulation of a theory about law. In most jurisprudential thought, such normative aims are the exclusive domain of justice theories as justified (possibly erroneously) by David Hume's famous maxim 'no ought from an is.'⁵⁵ By framing inquiry in such a goal-orientated or teleological manner, the New Haven School "aimed from the beginning not simply to understand the way the world worked, but to shape it."⁵⁶ The purpose of a theory about law for them is to appraise the process of authoritative and controlling decision in light of its capacity to achieve a preferred future public world order of human dignity.⁵⁷ Accordingly, a public order of human dignity for the New Haven School is defined as:

one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.⁵⁸

It is the right distribution of these human values that guides the way in which legal decisions ought to be made.

As stated, the explicit reliance on human values as a condition of legal appraisal puts the New Haven School significantly on the side of nonpositivist orientations in law. In fact, the use of human value claims in this way is similar to contemporary natural law theorists such as John Finnis, whose concept of objective goods (goods that all human beings desire) parallels many of the values of human dignity in the New Haven School.⁵⁹ The primary distinction between the New Haven School and other nonpositivist orientations is their demanded balancing between all of the conditions that make and shape the law.

In this way, the New Haven School is a framework for inquiry that refuses to shun any legal theory (or political, psychological, or social theory for that matter) if it sheds light on the reality of the legal process.⁶⁰ There are elements

⁵⁵ The is-ought problem in metaethics, as articulated by philosopher David Hume, is that many thinkers make claims about what ought to be on the basis of statements about what is. However, Hume found that there seems to be a significant difference between descriptive statements (about what is) and prescriptive or normative statements (about what ought to be), and it is not obvious how we can get from making descriptive statements to prescriptive statements.

⁵⁶ Oona Hathaway (2007). *The Continuing Influence of the New Haven School*. Yale Journal of International Law. Vol. 32, pp. 553, 558.

⁵⁷ Michael Reisman, Siegfried Wiessner, & Andrew Willard (2007). *The New Haven School: A Brief Introduction*. Yale Journal of International Law. Vol. 32, pp. 575, 576.

⁵⁸ Id.

⁵⁹ John Finnis (1980). *Natural Law and Natural Rights*. Oxford, OUP; see also Nigel Simmonds (2008). *Central Issues in Jurisprudence, Third Edition*. London, Sweet & Maxwell, pp. 113-135.

⁶⁰ In the concluding paragraph of a recent article about the New Haven school, three of its proponents quote a Chinese proverb and proclaim: "[i]t does not matter whether a cat is black or white but whether it catches mice. Our loyalty is to the values of human dignity and our goal is a world order producing and distributing those values. The New Haven School was established to refine and apply tools to achieve that goal. If there is a better cat around, we

of positivism, natural law, justice theories, moral philosophy, political science, and cognitive psychology embedded in their theory about law. It is a theory that is both prescriptive and descriptive: it is about the concept of law, the content of law, and it is also a theory of adjudication and interpretation. In whole, the New Haven School is an approach to legal understanding that attempts to comprehensively and holistically map social choice in a global context.⁶¹

Strangely, the New Haven School is a theory about law that has been somewhat discounted in legal thought in the decades since its formulation. A partial explanation of this marginalization can be blamed – not on the substance of the theory – but on temporal proximity to larger debates in legal philosophy in the late twentieth and early twenty-first century. Policy-orientated jurisprudence developed at a time when legalization and legal positivism was entering a renaissance, leading some theorists and legal scholars to criticize the policy-orientated approach as excessively subjective in the negative sense.⁶² Some critics have claimed that by aiming a theory at subjective goal values, the justification for any legal outcome could be manipulated to suit the interest of the more powerful party.⁶³ However, it is not the recognition of the role that values play in the legal process that undermines the approach; rather, the policy-orientated approach has been challenged by legal positivism in the same way that all nonpositivist orientations have. Legal positivists claim that gaining knowledge about unposited value can never meet the objective mandate of posited law, and therefore can never be claimed as law properly so called.

In the same way that some are skeptical about the idea of universal human values or universal human rights, some legal theorists tend to steer clear of the idea that objective knowledge about value can be determined in a manner that would justify their foundation or grounding in a theory about law. The policy-orientated approach does not retreat from such a possibility. In a very similar vein to that of the philosophical pragmatists, the New Haven scholars claim that theory should be orientated at a framework of *inquiry*, and that comprehensive inquiry can lead to real knowledge. To place a marker or target of such inquiry, the New Haven school postulates the overriding goal value of human dignity to which all inquiry ought to aim. It is the aim of this work to provide further methodological clarity about how to determine what constitutes the particulars of any theory about human dignity or justice. It is hoped that Q methodology can provide a mode for gaining empirical knowledge

would be the first to use it. As far as we have been able to tell, there is not.” Reisman, Wiessner, & Willard, *supra* note 57 at p. 582.

⁶¹ See Reisman, *supra* note 20 at p. 119.

⁶² e.g. Simma and Paulus describe the New Haven school as “conflating law, political science, and politics.” See Simma & Paulus, *supra* note 11 at p. 308.

⁶³ See Martti Koskenniemi (2001). *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Cambridge, CUP, p. 476.

about value subjectivity in a manner that assists in closing a weak link in all nonpositivist theory: a weakness that has manifest itself as skepticism about the possibility of measuring value objectively enough to permit its incorporation as a necessary component of jurisprudential thought.

Q methodology constitutes a technique for measuring subjective perspective by mapping and factoring points of convergence and divergence across a set of individuals.⁶⁴ It is often considered to be an inverted form of factor analysis in that traditional factor analysis correlates a set number of variables or tests across a population of persons, while Q technique correlates a population of persons across a set number of variables or tests.⁶⁵ Take the following example. In traditional factor analysis, the scores of a number of tests (one on reading comprehension, one on algebra, and one on advanced finance) are correlated to a set number of college students who have taken these tests. Traditional factor analysis will be able to identify, *passively*, if there is a statistically relevant positive correlation between the scores on one test in relation to another. The speculation would be that there is a positive correlation between the scores on the algebra and finance tests (because the subject-matter is related).

Q methodology inverts this process and focuses on how a set number of individuals respond *actively* to a set of tests or variables (usually a number of subjective statements on a particular topic). So, for example, in a Q method analysis, a set of individuals will be asked to evaluate a number of statements on a particular topic (called a Q sort). Their responses to these statements will be factor analyzed in a way that correlates shared modes of thinking on that topic. Instead of being passively subjected to measurement as is the case in traditional factor analysis, Q methodology requires participants to actively rank-order a set of statements from a subjective or first-person point of view (called operant subjectivity).⁶⁶

Q methodology is a technique for identifying shared subjective perspectives on a particular topic. The Q sorting process is specifically tuned for identifying shared patterns of subjective thought as they relate to value. In being able to

⁶⁴ For an overview of Q methodology, see Simon Watts & Paul Stenner (2012). *Doing Q Methodological Research: Theory, Method, and Interpretation*. London, Sage.

⁶⁵ Id. at pp. 7-10.

⁶⁶ The idea of operantcy “can be traced to Skinner [the eminent American behaviorist], and before that to Spearman [inventor of factor analysis], who were on the trail of this idea even before it became a central principle in physics. Science deals with operations associated with confrontable events, and in Q methodology self and subjectivity are rendered operational through Q technique. In the process of Q sorting, the person operates with statements or other measurable stimuli by rank-ordering them under some experimental condition. The operation is subjective inasmuch as it is me rather than someone else who is providing a measure of my point of view, and the factors which emerge are therefore categories of operant subjectivity.” See Steven Brown (1995). *The History and Principles of Q Methodology in Psychology and the Social Sciences*. British Psychological Society Symposium, ‘A Quest of for a Science of Subjectivity: The Lifework of William Stephenson.’ 12-14 December 1997. London, University of London.

map shared patterns of thought across a set of individuals, Q methodology configures the way that individuals respond similarly to a set of subjective statements on a particular topic. In the same way that traditional factor analysis can identify unobservable factors among empirically observable phenomena (such as test scores), Q methodology can identify unobservable factors among empirically unobservable (even unconscious) phenomena (such as cognitive process of the mind).

An example of a Q methodology study relevant to the law would be to ask a set number of legal scholars to rank-order a set of statements (usually from most agree to most disagree) on how the underlying values that make up the principle of good faith ought to be understood. An analysis of this particular Q sort would be able to identify a number of patterns across the individuals completing the Q sort. These shared patterns, although only subjectively knowable to each individual, can – once factor analyzed – form a foundation for shared subjective knowledge about value in that particular context. While this is still a long way from scientifically objective knowledge, the shared perspectives that emerge from a Q method study can go a long way in advancing our understanding of subjective value in the context of legal inquiry.

4.2 A Fair Configuration of Shared Subjectivity

The basic premise of this work is to advance value knowledge for legal inquiry by providing a theory and method for configuring legal fairness as based on shared subjectivities about value. This process is embedded with a number of assumptions that might be useful to delineate. What is meant by configuring fairness? What is meant by shared subjectivity, and why would knowledge about shared subjectivities provide a more robust and comprehensive understanding about how the law works as means of ordering society?

To start, the word fairness is being used to differentiate the term from that of justice. In some cases what is fair may also be just. For this reason, a clean division between justice and fairness is not possible or desirable. However, in the context of this work, fairness is being used to describe subjective justice. Subjective justice is how a society or community⁶⁷ would configure and maximize value distribution in a particular context. According to those of the Kantian tradition, a distinction between fairness and justice is not relevant

⁶⁷ One of the major tenets of a theory of configurative fairness is the identification of a relevant legal community. This can be difficult to identify at the international level. However, a theory of configurative fairness is a specific theoretical application to particular legal orders. In this way, it may be easier to identify a community as those with a stake in the way in which a particular legal order develops. That is, it will focus on the identification of the users or participants of such a legal order.

because that which is subjectively fair is objectively just. The reason for this is the importance given to the rational mind as being able to determine objectively that which is just. That is, what an individual wills as just through the rational process of the deliberative mind is objectively just. All individuals would come to the same conclusion about what is just through the use of their rational faculties alone. Kant calls this the categorical imperative.⁶⁸ While building on the thought of Kant, Rawls theory does not go quite so far. Instead he relies on a ‘thin theory of the good:’ an idea that there are a few basic objective principles of justice that all human beings – if acting rationally – would agree upon.⁶⁹

The theory of configurative fairness being advocated in this work does not make either Kantian or Rawlsian claims about the ontological truthaptness of justice. Rather, fairness is what a particular society or community would agree to about the configuration of shared value subjectivities. In the context of justice thought, this distinction is very important. For the Kantian, the categorical imperative allows for justice to become objectified as right reason. For the Rawlsian, the rational mind in the original position would always choose a set number of just principles upon which all other principles could be determined.

A theory of configurative fairness makes no such ontological claims about the truth value of justice. Instead, it claims that fairness – regardless of whether there is objective or absolute truth about it – can be determined by appealing to that which all members of a society or community would subjectively will. Under such a theory, the importance then shifts to determining what these shared subjectivities about value are. The focus for a theory of configurative fairness is on value epistemology: how can one gain knowledge about value in a manner that permits its description objectively. The intellectual tool for achieving this goal is shared subjectivity.

4.3 The Evolution of Investment Treaty Arbitration

International law in general has expanded significantly in the past fifty years, and for many, this increased level of legalization and specialization (negatively

⁶⁸ Kant holds that the fundamental principle of our moral duties is a *categorical imperative*. It is an *imperative* because it commands us to exercise our *wills* in a particular way, not to perform some action or other. It is *categorical* in virtue of applying to us unconditionally, or simply because one possesses a rational will, without reference to any ends that one might or might not have.

⁶⁹ “We need what I have called the thin theory of the good to explain the rational preference for primary goods and to explicate the notion of rationality underlying the choice of principles in the original position.” Rawls, *supra* note 24 at p. 349.

referred to as fragmentation)⁷⁰ at the international level is a good thing. However, it does present new problems for legal understanding because of the way that international law is structured – from outwith sovereignty, not within. International legal understanding is often complicated by the fact that most explanatory legal theories have primarily developed over the past half millennia through the prism of domestic sovereignty. As such, a number of significant conceptual hurdles must be overcome in transposing, if at all, general theories about law into specialized international and global theories about law. In the decentralized and anarchical world of autonomous sovereigns, a pure positivistic concept about the law as derived from within sovereignty is likely to provide only a minimal level of insight.

The transposition of legal theory from the domestic level to the international level has always been a challenge. Some theories, such as those of international legal idealism (as an attempt to codify international law in a manner similar to domestic legal structures), were quickly dismissed by political realists who believed that a rule-dominant understanding of international law failed to account for the power dynamics among sovereigns. They claimed that such idealism fostered a false confidence about rule adherence in the face of raw power. From a New Haven School perspective, the distinction between legal idealism and political realism is one that centers on the distinction between what Michael Reisman calls the ‘myth system’ and the ‘operational code.’⁷¹ Accordingly, excessive reliance on an ideal form of legal codification that does not operate in practice is both fool-hardy and dangerous. At the same time, ignoring the interactive communicative dynamics that gives rise to an international rule of law (however weak) is a similarly unbalanced approach. While an extreme version of a utopian international rule of law is unlikely given the dynamics of power from outwith sovereignty, the cynicism of the political realists has demonstrably failed: international law does obligate.⁷² While the claim that it is challenging, and sometimes impossible, to enforce international law among autonomous sovereigns is valid, it becomes less valid when viewed through the lenses of increasingly nuanced and creative theories on how international law gains compliance.⁷³

⁷⁰ For the negative implications, see Gunther Teubner & Andreas Fischer-Lescano (2004). *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*. Michigan Journal of International Law. Vol. 25, p. 999.

⁷¹ Reisman’s own philosophic orientation about the law has been labeled as a realistic idealism. For more on the idea of the myth system and operational code, see Michael Reisman (1977). *Myth System and Operational Code*. Yale Studies in World Public Order. Vol. 3, p. 230.

⁷² Not all the time, but neither does domestic law. The fact that people break the law does not mean that it is not a law that they are breaking.

⁷³ See Oona Hathaway & Scott Shapiro (2011). *Outcasting: Enforcement in Domestic and International Law*. Yale Law Journal. Vol. 121, p. 252; Jutta Brunnée & Stephen Toope (2010). *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge, CUP; Andrew

This is never to say, however, that political and moral values do not influence, motivate, and even dominate, legal decisions in the international sphere. In fact, it may be that value plays an even more significant role in international law than domestic law. One of the overriding problems at the international level lies in determining if there is such a thing as an international community, and whether or not such a community contains a collective interest whose values are shared. At the domestic level, the community to which a legal order aims is more easily identifiable and is often restrained to a finite geographic proximity. This is not always possible at the international level. There are considerable problems that arise in attempting to identify a relevant international legal community, and even if such a community of interests is identified, sovereignty often confuses matters. Claiming that a state forms a single community interest in the international legal system will often be held as insensitive to the contextual particularities of each state – and to the individuals residing within it. As such, when looking at particular legal orders at the international level, it is often difficult to articulate what values its participants espouse. A possible way to understand these problems is to look at a particular international legal order and to analyze how values influence and impact its development.

International investment treaty arbitration is one such regime⁷⁴ whose rapid development and diverse value claims make it an ideal candidate for a theory that seeks to clarify what participants using this legal order value; and whether or not there is any possibility for identifying if the diverse and often conflicting value claims, as perceived by participants in the regime, overlap in any meaningful way (despite its overwhelmingly global scope). The idea is that by identifying shared patterns of thought about value subjectivity in the context of investment treaty arbitration, unobservable factors will emerge that demonstrate a way forward on seemingly intractable issues. Can for example, an acceptable definition of what constitutes an ‘investment’ ever be understood in such a global context of diverse interests?⁷⁵ A theory of configurative fairness claims that the underlying value subjectivities that inform various legal positions (such as a definition of investment) are identifiable. The question for the theory is whether the identification of these

Guzmán (2007). *How International Law Works: A Rational Choice Theory*. Oxford, OUP; Harold Koh (1997). *Why Do Nations Obey International Law?* Yale Law Journal. Vol. 106, p. 2599.

⁷⁴ The term regime is being used to differentiate it from a system. It will be used throughout this work to refer to particular international legal orders. A legal order described as a regime may be less comprehensive and cohesive than a legal order conceived as a system of law. A regime, as used in this work, is taken from Stephen Krasner who defines an international regime as: “[i]mplicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen Krasner (1983). ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables,’ in Stephen Krasner, ed., *International Regimes*. Ithaca, Cornell University Press.

⁷⁵ For an overview of this particular debate, see Julian Mortenson (2010). *The Meaning of Investment: ICSID’s Travaux and the Domain of International Investment Law*. Harvard International Law Journal. Vol. 51, p. 257.

various value positions converges in a manner that would permit a configuration of the law in a way that is acceptable to all of its participants. If such a value consensus can be identified, then particular rules in the legal order can be configured in a way so as to satisfy the shared value understandings that inform such legal rules.

Investment treaty arbitration is a particular form of international dispute resolution that is embedded in thousands of bilateral investment treaties (BITs) and in investment chapters in a number of plurilateral free trade agreements (FTAs).⁷⁶ From a theoretical perspective, the systemic issues of this legal order concerns whether such an international dispute settlement mechanism can ever be fair and legitimate when resolving disputes about the internal affairs of a state. The particular (adjudicative) issues relating to investment treaty arbitration pertain to the practice of actual arbitrations, with scrutiny focusing on the manner and scope of the decisions that arbitrators render in such disputes.

This dissection exposes two theoretical angles to the discourse on investment treaty arbitration. The first is based on a regime-building and process-orientated focus that is entrenched in questions of how a system of law of this type ought to be configured, and the second is based on a decision-orientated and adjudicative focus: that is, what can legal theory tell us about the decisions that international arbitrators do or should make? The focus of inquiry into these two areas of investment treaty arbitration are interrelated, but distinct. The first focus is to ask: how should this legal order develop? The second focus is to ask: how should arbitrators decide cases? The focus of the Q method study being conducted in the context of this work will look at the first question. The study is concerned with drawing insights about how the worldviews and perspectives of individuals using this system of law perceive its capacity to maximize the values that they believe such a legal order ought to endorse.

In attempting to improve knowledge about value in international legal theory, the Q method study used in this work focuses on the issue of fairness in investment treaty arbitration,⁷⁷ and looks at the diverse issues under debate

⁷⁶ For a good overview of international investment law, see Rudolf Dolzer & Christoph Schreuer (2012). *Principles of International Investment Law, Second Edition*. Oxford, OUP; José Alvarez (2011). *The Public International Law Regime Governing International Investment*. The Hague, Pocketbooks of the Hague Academy of International Law; Jeswald Salacuse (2010). *The Law of International Investment Treaties*. Oxford, OUP; Muthucumaraswamy Sornarajah (2010). *The International Law on Foreign Investment, Third Edition*. Cambridge, CUP; Peter Cameron (2010). *International Energy Investment Law: The Pursuit of Stability*. Oxford, OUP; Zachary Douglas (2009). *The International Law of Investment Claims*. Cambridge, CUP; August Reinisch (2008). *Standards of Protection in International Investment Law*. Oxford, OUP; Campbell McLachlan, et al. (2007). *International Investment Arbitration: Substantive Principles*. Oxford, OUP.

⁷⁷ The Q method study was conducted online, and is located at: www.fairnessdiscourse.org (last visited 1 September 2013). The title of the study is: *Measuring the Immeasurable? Fairness Discourse in Investment Treaty Arbitration*.

in investment treaty arbitration in the hope of clarifying points of subjective value knowledge that are shared. Investment treaty arbitration blends together many, if not all, of the most thorny issues in current jurisprudential thought.⁷⁸ It therefore, provides an ideal forum for proposing a theory about law and value in the context of legal thought and understanding. Broadly speaking, four major focal points in investment treaty arbitration provide such a basis for inquiry: 1) it is a regime of international law, which forces considerations about sovereign authority and autonomy largely absent in the domestic or municipal context, 2) it is a rapidly evolving legal order with a decentralized institutional organization (rules are largely being developed by ad hoc arbitral tribunals and influential publicists), which means that ideas relating to the sources of law continue to be discussed, 3) it is a legal order thick with debate about its content, purpose, and function, which in the context of gaining knowledge about value is central, and 4) it is a legal order whose hybridization of both public-private and domestic-international issues in the context of international legalization creates a tension in value perspectives about the scope of private law in the framework of public law authority and control, and about the interplay between domestic and international rules in the context of international adjudication.

⁷⁸ A survey of some of the major issues enveloping the discourse are detailed in an increasingly large scholarship, see e.g.: Devashish Krishan (2011). 'Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was,' in Stephan Schill, ed. *International Investment Law and Comparative Public Law*. Oxford, OUP; Michael Waibel, et al., eds. (2010). *The Backlash against Investment Arbitration*. The Hague, Kluwer; David Caron (2009). *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*. Suffolk Transnational Law Review. Vol. 32, p. 513; Noemi Gal-Or (2009). *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*. Suffolk Transnational Law Review. Vol. 32, p. 271; Charles Brower & Stephan Schill (2009). *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* Chicago Journal of International Law. Vol. 9, p. 471; Christopher Ryan (2008). *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*. University of Pennsylvania Journal of International Economic Law. Vol. 29, p. 725; David Schneiderman (2008). *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge, CUP; Jason Webb Yackee (2008). *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*. Asian Journal of WTO & International Health Law & Policy. Vol. 3, p. 121; Andrea Björklund (2007). *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*. Hastings Law Journal. Vol. 59, p. 241; Jeswald Salacuse (2007). *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*. Fordham International Law Journal. Vol. 31, p. 138; Ann Capling & Kim Nossal (2006). *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*. Governance. Vol. 19, p. 151; Muthucumaraswamy Sornarajah (2006). *A Law for Need or a Law for Greed? Restoring the Lost Law in the International Law of Foreign Investment*. International Environmental Agreements. Vol. 6, p. 329; Susan Franck (2005). *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*. Fordham Law Review. Vol. 73, p. 1521.

5. VALUES AND JURISPRUDENTIAL THOUGHT

The incorporation of value knowledge in theories about law presupposes that values matter in the way that legal orders develop. It claims that the way that decisionmakers decide and the way that scholars analyze and discuss the law is premised on the way that he or she conceptualizes the world; and that the intellectual work that one is tasked with is influenced and motivated by the manner in which the human mind appraises the things that it values. It is from this foundation that a theory of configurative fairness can be grounded.

Such a theory also assumes that value is infused in any theory about law, albeit in varying degrees according to the particular theoretical orientation that one takes as their starting point for inquiry. For conceptual theories about law, epistemic values about predictability, coherence, and determinacy, for example, are claimed as sufficient to understand the law.⁷⁹ However, while not explicitly moral – or aimed at justice – epistemic or cognitive values are values too.⁸⁰ They are things that one values in a legal system or order. They are the things that its proponents believe are indispensable to a properly functioning system. For normative theories about law, moral and political values (in addition to epistemic values) must also be considered in both the description and evaluation of the law. For some political theorists, especially those of a realist orientation, law is rooted in the value of political choice and power prerogative. What all of these theoretical orientations have in common is that they are infused with value. It is an unavoidable dilemma in human thought: all thought is informed by the capacity of the human mind to judge.

The question for legal theory then is not to ask whether a value-free ideal is possible, but rather, it is to ask what degree of subjective value should be permitted in the way that the law is conceptualized. To do this, the goal of a legal theory must be delineated. What is the work it is trying to do? If one looks at the function of law as its capacity to order human interaction, then the ability of the law to achieve its goals must not derogate its focus away from the things that human beings value. The goal of the law, under such a view, becomes more important than its intrinsic nature. It is a tool for shaping and sharing values among a community of individuals. It is from this perspective that a theory of configurative fairness derives its utility.

Combined with the claim that law and value are entangled at every level of theoretical inquiry, the job of jurisprudence is to assist in advancing our understanding of what goals the law should orientate itself towards, and how an improved knowledge of the things that human beings value can help achieve such a goal. The identification and analysis of value in legal decision

⁷⁹ See Brian Leiter (2003). *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*. American Journal of Jurisprudence. Vol. 48, pp. 17, 34.

⁸⁰ Putnam, *supra* note 28 at p. 30.

and discourse – whether the focus be inside or outside the state – is an arena that can benefit from the development of innovative, empirical, and creative methodologies for its measurement. Nearly a century ago, Benjamin Cardozo stated that:

[w]e may try to see things as objectively as we please. Nonetheless, we can never see them with the eyes except our own. I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others.⁸¹

Now in the early twenty-first century, it is hoped that the use of Q methodology can assist in rationalizing just such a process.

6. A ROAD MAP

This first Chapter is intended as both a general overview of the theory and method being proposed, and to lay out the structure of subsequent Chapters. The main objective of this work is to provide a theory for the incorporation of subjective knowledge about value into the analysis of law through the employment of Q methodology: a method for the measurement of human subjectivity that combines psychometrics with empirical research procedures. Q methodology will be demonstrated through a study on the fairness discourse in investment treaty arbitration. The study will be structured as means for configuring fairness in the context of evolving international legal orders.

It is hoped that the combination of this study, and the underlying theoretical and methodological foundation upon which it is based, will significantly improve the way that value knowledge can be obtained in the context of nonpositivist theories about law. As noted in the preceding section, the problem of subjective knowledge in jurisprudential thought is a longstanding and unresolved issue. Attempts at measuring the way individuals think, and more importantly, how values and preferences influence and motivates legal reasoning and legal actions, is considered to be a most formidable task. It is proposed that Q methodology can provide valuable insight into understanding how individuals, both inside and outside the law, think about it. When speaking about thought in this context, one is presupposing that values matter in both legal decision and legal discourse: a claim that fact and value are not separate, but necessarily connected in legal thought and reasoning.

⁸¹ Benjamin Cardozo (1921). *The Nature of the Judicial Process*. New Haven, Yale University Press, p. 9.

6.1 Research Questions

As a contribution to jurisprudence, this work seeks answers to the following two-fold research question: first, if one claims that all lawmaking, lawapplying, lawshaping, and lawinfluencing – from the local to the global – involves subjective value judgments in both decision and discourse, can shared knowledge about these perspectives (subjectivities) be gained in a sufficiently objective manner so as to support their integration into legal analysis; and second, if one claims that individual and community perspectives about value distribution are influential in the evolution of legal regimes, can knowledge of shared expectations about values in the discourse on investment treaty arbitration ground a theory of configurative fairness for evolving international legal orders more generally?

6.2 A Brief Outline

As these research questions may indicate, this work cuts across vast swaths of intellectual inquiry. Before contemplating the details of configurative fairness in the context of investment treaty arbitration, a more general description of the theoretical underpinnings of this project must be delineated. The remainder of this Chapter will briefly describe the content of the theoretical and methodological models that will be used to develop a theory of configurative fairness. The following sections will summarize the Chapters of this work. Structurally, the Chapters will move from the general to the specific, with the intention of laying out the main issues that are being proposed. Chapters in this work will proceed under the following eight main headings, and will be briefly introduced in the following sections of this Chapter: between objective fact and subjective value; legal positivism and legal nonpositivism; values and international legal theory; a theory of configurative fairness; Q methodology and legal analysis; investment treaty arbitration and its discontents; configuring fairness in investment treaty arbitration; and the way forward.

6.2.1 Between Objective Fact and Subjective Value

Before detailing the specifics on legal theory and how knowledge about values can be determined in the context of legal inquiry, it is necessary to outline some of the general philosophical debates about knowledge and truth. In terms of values, the general philosophic discourse looks at distinguishing between facts and values. These two simple concepts, and how they are defined, are discussed in many areas of philosophical inquiry, including: metaphysics, epistemology, and ethics. And sub-types of such inquiry will

focus on the philosophy of science, the philosophy of law, political philosophy, moral philosophy, and reason and logic. In each of these categories, the problem of differentiating between fact and value is central. This is because what is factual and what is valuable go to the core of what truths human beings can know about themselves and the world. The search for these truths (and how one gains knowledge about them) is the focus of philosophical inquiry in general. However, as will be seen, the debate trickles down into specialized areas of philosophical inquiry such as the philosophy of law. This Chapter will explore these debates by looking at the fact-value relationship, the subject-object relationship, the mind-world relationship, and the epistemology-ontology relationship. All of these relationships have bearing on how legal philosophy is approached, and how knowledge about law and value can be determined.

6.2.2 Legal Positivism and Legal Nonpositivism

Moving from general philosophical inquiry about truth and knowledge in the context of facts and values, this Chapter will narrow in on jurisprudence more specifically. The focus of this Chapter is to distill legal theory along lines that improve clarity about the role of values in jurisprudential thought. In terms of the contemporary discourse on the philosophy of law, there are two major categories that form the basis of inquiry: positivism and nonpositivism.⁸² This Chapter is intended to form a foundation for understanding how subjective values can be illuminated as shared subjectivity; and in turn, how they can be used to form a basis for a theory of configurative fairness. The first goal of this Chapter then is to make the case for why values (and knowledge about them) are critical for comprehensively understanding what the law is and how it actually operates in practice. Once this argument has been articulated, the role of values in the various types of legal theories will be explored.

At its most refined level, positivism and nonpositivism are theories about law that turn on whether or not the value-free ideal for the concept of law is possible. From there, theory moves into distinctions between various areas of specialized jurisprudence (such as constitutional law, international law, or theories of adjudication), and whether or not these theories *of* law (as opposed to theories *about* law) can be determined (both described and evaluated) without resort to values (especially moral and political ones). The final distinction turns on the separation of theories about law (analytic jurisprudence) and theories about justice (normative jurisprudence). In terms of value knowledge, a key consideration in looking at these types of theories is to determine if a distinction between them is actually sustainable.

⁸² An important caveat being that there are a whole host of terms and concepts used in jurisprudence that make the simple dissection of legal thought into two camps impossible.

6.2.3 Values and International Legal Theory

This Chapter will turn its gaze on international legal theory and the particular problems that arise in understanding international law. While value knowledge in the context of sovereignty presents specific problems for determining exactly what a state values, the general problems about value epistemology and the challenges involved in incorporating value knowledge in legal theory are not completely unique to international law. Such an observation can be made at the micro-level as well: that is, understanding law and value at all levels – from the local to the global – involves many structural similarities. All law involves human interaction in particular social contexts; whether they be at the global level and as defined by persons representing states, or at the microlaw level as informal legality between individuals.⁸³ Given this reality, it is surprising that legal theorists tend to focus on a particularly narrow conception of law as that emanating from the authority of the state. This limited view in legal theory is changing though, and theorists are increasingly looking at comprehensively understanding the regulation of social behavior whether inside or outside state. This Chapter will begin by historically reviewing the evolving concept of sovereignty in the post-Westphalian period. From there, particular international legal theories will be explored, culminating with an explanation of the policy-orientated jurisprudence of Harold Lasswell, Myres McDougal, and Michael Reisman.

6.2.4 A Theory of Configurative Fairness

At this point in the work, the focus will shift from descriptions about the relationship between law and value to a theory of configurative fairness. A basic premise of this theory is the prerequisite of improved knowledge about value in the context of legal understanding. If knowledge about value can be determined in a manner that is sufficiently objective so as to facilitate its incorporation in jurisprudential thought, then a theory of configurative fairness can be used to evaluate how a fair legal order ought to be configured. Such a statement makes a number of assumptions that should be clarified. A theory of configurative fairness assumes that legal knowledge and value knowledge are inseparably intertwined. It assumes that fair, just, and legitimate legal orders cannot be determined or evaluated without recourse to value understanding. It assumes that the concept of fairness should be described as ontologically subjective (that is, it makes no truth claims about the universality or objectivity of justice). The meaning given to fairness in this context is one that claims that fairness is the configuration of shared subjectivities about value to which members of a particular community or society would agree. A theory of configurative fairness assumes that knowledge

⁸³ See Michael Reisman (1999). *Law in Brief Encounters*. New Haven, Yale University Press.

about value can be measured as shared subjectivities, and that an overlapping consensus about value claims can be determined using methods such as Q methodology. Finally, it assumes that legal orders can be developed by configuring legal rules, principles, rights, and obligations around shared expectations about value maximization and distribution.

6.2.5 Q Methodology and Legal Analysis

This Chapter will explore the theoretical underpinnings of Q methodology, how the technique is used, and the implications for its use in legal thought. Q methodology is an essential aspect of this work and provides a methodological bridge for gaining knowledge about value in legal inquiry. The novelty of this method as applied to legal thought is its potential to derive sufficiently objective (as shared subjectivities) information about values in a particular legal context. It is theorized that Q methodology can provide a mode of empirical analysis that will permit a theory of configurative fairness to work. Q methodology seeks to provide both a qualitative and quantifiable analysis of human subjectivity, with self-referential meaning and interpretation being central.

In the context of this work, Q methodology will be able to create typologies (called shared subjectivities) about value claims in legal thought. These typologies will be constructed by determining the value perspectives of individuals in a particular legal context. In terms of incorporating value knowledge as a component of legal knowledge, Q methodology allows the researcher to evaluate value positions as they are thought about and justified by the individual interpreting particular legal problems. This technique mirrors the position on value knowledge taken in this work: values are epistemologically subjective in that they are determined as reasoned deliberation, argument, and justification that is internal to the self. If this position is correct, then Q methodology can accurately map value perspectives across individuals (resulting in shared subjectivities about value).

6.2.6 Investment Treaty Arbitration and Its Discontents

This Chapter will focus on a specific legal order: the evolving global order of investment treaty arbitration. International and global law has been transformed since the Second World War: traditional regimes have evolved and revolutionary regimes have emerged. While the treatment of aliens has been a longstanding topic of law, it was not until fifty years ago that modern investment treaties emerged. Relating to the treatment of foreign direct investment by states hosting such investments, the investment treaty regime,

and its principal method of dispute resolution – investor-state arbitration, has provided significant challenge to the traditional conceptualization of international law. Two aspects have been deemed most radical: 1) the extension of legal personality to individuals and corporations in international law, and 2) the decoupling of sovereignty and dispute resolution through use of party-appointed arbitrators in resolving claims of public interest. In addition to these two core aspects, there are a multitude of specific legal issues that have made this evolving legal regime one of the most controversial in the present globalization era. This Chapter will explore how this legal order is evolving, and why there is so much discontent with it.

6.2.7 Configuring Fairness in Investment Treaty Arbitration

This Chapter will describe, analyze, interpret, and evaluate the Q methodology study on the fairness discourse in investment treaty arbitration. The goal of this study is not to provide definitive answers about which perspectives on fairness in investment treaty arbitration are right or wrong. Rather, the idea is to provide sufficiently objective analysis about these human subjectivities in a way that the discourse can begin to move from ‘perceptions matter’ to ‘this is how and why the various types of perceptions matter.’ In attempting to measure and understand the value perspectives that all legal decisionmakers and discourses use to inform and influence the way that they approach legal problems, the results of this study will assist in delineating points of overlapping consensus on issues relating to value distribution in investment treaty arbitration. The results of the study demonstrate the utility of Q methodology in determining shared value understandings and how these shared subjectivities can assist in configuring legal orders that its participants consider to be fair.

6.2.8 The Way Forward

This brief final Chapter will attempt to pull together the insights gained from the diverse strands of knowledge explored in this work. The focus will be to evaluate the utility of Q methodology as a tool for advancing knowledge about values in jurisprudential thought. While there is little doubt that Q methodology can provide insight into the way one thinks about the world, the question for this work is whether or not the subjectivities that Q methodology can capture are insightful measures of how values are thought about in the context of legal decision and discourse. It is claimed that Q methodology indeed provides a compelling method for legitimizing legal theories that rely on value considerations in determining and evaluating the content of the law.

CHAPTER 2

BETWEEN OBJECTIVE FACT AND SUBJECTIVE VALUE

1. INTRODUCTION

This is a work of jurisprudence, but before delving into the details of legal thought, it is important to distil a number of more general philosophic inquiries. Central to this inquiry are the concepts or ideas of objectivity and subjectivity, and fact and value. These concepts are very general in nature and can be used to delineate a number of diverse ideas. It therefore might be a good idea to explore these ideas in some detail before moving on to the details of jurisprudence proper: the subject of the following Chapter. The purpose of this Chapter is to lay the philosophical groundwork for a discussion about how values can be described and measured in legal decision and discourse. For many, the measurement of values is not possible because what one values is a purely subjective enterprise that cannot be accessed in terms of true or false statements. Furthermore, the way that facts are determined – as corresponding to some kind of empirically verifiable object – does not work for knowing values. Values, under this view, are not objectifiable in any real sense, they are only the result of judgment, and judgment is a process of justification and argument:¹ either as a felt sentiment or intuition (forms of emotivism) or as reasoned deliberation (forms of cognitivism).

These distinctions have created innumerable problems for the way that one thinks about values in the context of legal decision and discourse. The goal of this Chapter is to determine under what configuration of reality could values become objectively measurable. It is posited that, while values do not exist ‘out there’ in the world, they are capable of objective reflection as shared subjectivities. This view is akin to Kantian moral objectivity (but without its metaphysics)² and its ability for value knowledge, while subjective, to be discovered (or constructed)³ through rational processes. The problem has

¹ Making judgments and valuing is always going to be subjective in the sense that it emanates from a process internal to the self and not external (unless one supports a position of moral realism). However, there are theories (primarily in the Kantian tradition) that hold that, despite emanating from the subjective self, the process of evaluating and judging about values can be done in an objective manner. That is, such judgments are not idiosyncratic. Rather, they are capable of a singular ‘correct’ answer across all subjective selves.

² In essence, the view about the possibilities of value knowledge is one that closely approximates Kantian morality without its metaphysics. This is not a novel viewpoint. It is something long developed by John Rawls and Christine Korsgaard. See e.g. John Rawls (1980). *Kantian Constructivism in Moral Theory*. *Journal of Philosophy*. Vol. 77, p. 515; Christine Korsgaard (1996). *The Sources of Normativity*. Cambridge, CUP.

³ The question of whether values are discovered or constructed is another problem that arises in this area of philosophical thought. However, the answer to this question deals with the metaphysical aspects of value existence. For the purposes of this work, empirical knowledge

always been that empirical verification of such objectivity is difficult to obtain given the subjective locale (internal processes of the mind) of such knowledge. However, if one does not get bogged down by the metaphysical aspects of having to prove whether shared subjective knowledge about value is capable of truth, then the ability to determine how values are shared across human minds is possible through knowledge of shared perspectives; and it is proposed that empirical knowledge of such shared subjectivity is possible through the employment of Q methodology.

This work will focus on two distinctions that relate to how one understands values in the context of jurisprudence: 1) the objectivity-subjectivity distinction and 2) the fact-value distinction. These concepts will first be discussed in terms of how the distinctions are thought about in everyday life. Such a description may provide a useful point of departure for discussing these concepts as they are thought about in epistemology and ontology more generally. Once the history of ideas about these concepts is briefly analyzed, the discourse will turn to the way the ideas of objective fact and subjective value fit in the context of jurisprudential thought. It is hoped that providing a background on these concepts will enhance later discussions on how value is described, analyzed, and evaluated in jurisprudence.

2. WHAT IS A FACT AND WHAT IS A VALUE

When one speaks about facts and values, it is common to hear that facts are objective and values are subjective. But what exactly does that mean? The common usage of a fact is something (an entity) that has actually occurred or is actually the case. To make such a claim, the standard for determining a statement of fact lies in its verifiability; that is, whether or not the fact can be proven to correspond with experience. In philosophical terms, this is considered to be the correspondence theory of truth.⁴ It claims that what makes a proposition true is that it corresponds to a fact related to the world. Facts of this type can be understood as those entities to which a true sentence refers (called matters of fact). An example of this might be to say that it is a fact that Jupiter is the largest planet in our solar system. The fact that the largest planet in our solar system is Jupiter makes it true. Matters of fact are dependent on experience or empirical evidence.

However, there is another way that the concept of fact is also used: the relation of ideas. Facts of this type can be understood as those entities that

about the way that values are shared does not require proof about whether they are discovered or constructed.

⁴ This theory is in contradistinction to the coherence theory of truth which holds that the truthfulness of a statement (fact) lies in the relationship between other such statements and not the world. The truth or falsity of a statement requires no correspondence to a fact existing in the world.

make a true sentence true. For example, it is a fact that all bachelors are unmarried; or that two plus two equals four. These are facts that are knowable through logical thought alone: the statement makes them true. Finally, the idea of what is a fact also relates closely to scientific inquiry. A scientific fact is generally regarded as something that is an object independent of the observer (the subject). This correlation places objectivity and fact as mutually supporting concepts. It is commonly claimed that which is objectively verifiable is a fact. This idea will be detailed in the following sections as it is central to historical understandings of the distinction between facts and values. Essentially, in common usage, facts are objectively verifiable entities whose truth exists independently from how anybody thinks (reasons) about them.

Values, on the other hand, do not possess the same attributes as facts; and as such, knowledge about values are considered distinct enterprises. This work challenges this view in claiming that while knowledge about facts and values may be distinct enterprises, they are not dichotomous (as opposed to distinctions).⁵ This means that knowledge about facts cannot be uncovered without reference to values; and that knowledge about values are irrelevant without reference to particular states of the world and how human agents interact with others in the world. However, regardless of whether or not there is a fact-value dichotomy, there is common usage of the word value that relates to relative degrees of importance given to: 1) other values (the relationship between values); and 2) matters of fact to which values refer (the relationship of values to ideas, concepts, and entities). In this sense, values can be seen as relative or contingent upon the ideas to which they refer, and therefore are said to be subjective to context.

Values are also said to be subjective in that they relate to states of the mind as opposed to states of the world. If values do not exist 'out there' in the world, and they are confined to the internal deliberations of the self, then knowledge about them is considered to be subjective. However, there are all kinds of theories (developed below) that claim that values are actually objective in nature: that is, they are either capable of stating true propositions, or they actually exist in the world independent of the human mind. In the postmodern era, these views are minority positions. The general problem with values is that they are assumed to be incapable of stating truth propositions and therefore lead many to believe that values can only be subjectively knowable. This use of the word subjective is often used as code for the impossibility of objective⁶ knowledge about values. Under this common view, values merely

⁵ The difference in terminology is important because a dichotomy connotes that fact and value inquiry can never cross paths. A distinction, on the other hand, connotes a difference, but does not create an analytical barrier between concepts.

⁶ Objective in the sense that values can conform to either the correspondence or coherence theory of truth.

reflect feelings, emotions, intuition, or preference. There is nothing that can be objectively known about them.⁷

Like facts, values are a broad category of type that are not easily generalized. Facts contain distinct subcategories that each have their own methods for inquiry.⁸ Likewise, values come in a wide variety of subtypes. While it is common to think about values as referring to ethics and morality – what one values in terms of both what constitutes a good life and how we are to treat each other – there are many categories of value that can be dissected. There are ethical values, moral values, political values, social values, cultural values, legal values, economic values, religious values, aesthetic values, cognitive values, epistemic values, among others. Each type of value claim has its own set of particular values that carry more or less weight in different contexts. One of the key differences between the various types of facts and the various types of values is the way in which one gains knowledge about them. It is commonly stated that values require making judgments, and that one can only make judgments by reasoning with the use of tools such as justification and argument. Advocates of a rigid fact-value dichotomy reference this difference in how one gains knowledge about value as diametrically opposed to how one gains knowledge about facts.

3. A BRIEF HISTORY OF FACT AND VALUE

Now that a basic description of facts and values has been given, a brief historical survey of the fact-value divide will be provided. In attempting to improve knowledge about values in the context of legal decision and discourse, this work is explicitly interested in understanding why knowledge about values in jurisprudence are often considered to fall outside the realm of possible objective legal knowledge. However, this debate between facts and values is not specifically a jurisprudential problem. It spans all of philosophy. According to Hilary Putnam:

[t]he idea that value judgments are subjective is a piece of philosophy that has gradually come to be accepted by many people as if it were common sense. In the hands of sophisticated thinkers this idea can be and has been developed in different ways. [Some] hold that ‘statements of fact’ are capable of being ‘objectively true’ and capable, as well, of

⁷ However, this is only one way of looking at the subjectivity of value. There are a number of theories holding that value knowledge is a product of the mind, but that they are produced from reasoned thought, and therefore are not mere preference. Under such theories, values are subjective in that they are internal to the self, but they are objective because all right thinking selves would understand the truth of a particular value in the same way. This is akin to Kant’s famous categorical imperative.

⁸ Some of these subtypes of facts include: scientific, natural, analytic, synthetic, mathematical, or logical facts. These types generally refer to the two general fact categories stated above: matters of fact (a posteriori factual knowledge) or relations of ideas (a priori factual knowledge).

being 'objectively warranted,' while value judgments, according to these thinkers, are incapable of object truth and objective warrant. Value judgments, according to the most extreme proponents of a sharp 'fact-value' dichotomy, are completely outside the sphere of reason.⁹

If Putnam is stating the contemporary understanding of the difference between facts and values, then there may be little that one can come to know about values. What then is the connection between subjectivity and values? And does the subjectivity of value mean that knowledge about it is unobtainable? The quote above is indicative of a common claim: the word subjective in reference to values means that they neither exist in the external world or in the internal reasoning mind. Instead, it is claimed that values are mere preference, emotion, or feeling. They are incapable of empirical verification (except as conscious external behaviors).¹⁰

For example, take the following claim: the level of subjectivity accorded to the legal decisionmaker can lead to decisions that are based on ideological or political preferences. Such a statement is commonplace in legal discourse and yet it is almost impossible to understand what exactly is being said. For the most part, the subjectivity of the legal decisionmaker, in this context, is seen as a negative attribute because it is implicitly stating that it is impossible to predict how one will decide. This makes decisions arbitrary, interest-based, indeterminate, biased, or willy-nilly. However, this negative claim about decisionmaker subjectivity is grossly overstated; otherwise, there would be no semblance of order whatsoever, and that clearly is not the case. The question then is to ask why legal subjectivity is considered such a negative concept; and why the answers for overcoming such subjectivity in law is constrained to concepts of positivism. Could not another possibility be in the search for improving knowledge about subjective value considerations on their own terms? History may provide a partial answer as to why this has not occurred.

3.1 The Humean Legacy

The modern debate about the fact-value divide, and how knowledge and ontological truth about facts and morality¹¹ is to be determined can be traced largely to the philosophy of David Hume. As a key enlightenment era thinker,

⁹ Hilary Putnam (2004). *The Collapse of the Fact-Value Dichotomy and Other Essays*. Cambridge, Harvard University Press, p. 1.

¹⁰ This is the view in psychology of behaviorism. The unobservable mind is not amenable to empirical study and therefore psychological inquiry is to focus exclusively on externally observable phenomena. Under this view, what is knowable must be presented as observable behavior. Trying to find out what exists in the mind is beyond the scope of empirical inquiry.

¹¹ The work of David Hume predates a discourse on a formal fact-value divide. However, the distinction between factual knowledge and moral knowledge is central tenet in all of Western philosophy.

Hume developed a philosophy holding that desire, not reason, governed moral human behavior, and that humans can only have knowledge of things that they directly experience (empiricism). This philosophical outlook is skeptical about the ability of reason to generate any kind of knowledge or truth (whether it be facts or morality). However, the empiricists claimed that there was indeed a world that existed independent of the mind, but that one comes to know the world from sense impressions, not reason. His skepticism about rational value knowledge, on the one hand, and the existence of a mind-independent world on the other, are important in understanding how philosophers since Hume have responded to his ideas. Most importantly,¹² Kant famously credited Hume with awakening him from his ‘dogmatic slumber,’¹³ and indeed much of Kantian thought is aimed at a refutation of Hume’s empiricism.

3.1.1 Moral Antirationalism

For the purposes of this work, Hume’s moral philosophy is particularly relevant for understanding why gaining objective knowledge about value is a challenge. For Hume, it is not just a challenge, there is actually nothing to know about them through reason. He claims that:

[m]orals excite passions, and produce or prevent actions. Reason itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of our reason.¹⁴

Under this view, Hume is endorsing a form of emotion or sentiment as grounding morality. This means that, for him, gaining objective and universal knowledge about morality specifically, and all other types of value judgments more broadly, is not possible. Reason for him is a slave to the passions; and passions cannot be reasoned about or directly observed by the senses (they are purely subjective).¹⁵ This means that, while often observable as external behavior, they are incapable of being truthapt. Combined with his empirical approach to knowledge, there leaves little room for knowledge about value (whether existing as the internal deliberations of the reasoning mind or as external entities existing ‘out there’ in the world). For these reasons, Hume’s moral philosophy is often called antirationalism or moral sense theory.¹⁶ The

¹² This is because his outlook deals with the most complex and core issues in philosophical thought: epistemology, metaphysics, and ethics.

¹³ “I freely admit that it was the remembrance of David Hume which, many years ago, first interrupted my dogmatic slumber and gave my investigations in the field of speculative philosophy a completely different direction.” Immanuel Kant [1783](2004). *Prolegomena to Any Future Metaphysics*, translated by Gary Hatfield. Cambridge, CUP, p. 4.

¹⁴ David Hume [1739](1978). *A Treatise of Human Nature. Book III: Of Morals*. Oxford, OUP, Section I.

¹⁵ Id.

¹⁶ Moral antirationalism is a metaethical view that rejects the possibility of moral truths as knowable a priori, by reason alone. Moral sense theorist, likewise, believe that reason and

practical implications of such a moral philosophy will bear heavily on the next two hundred years of philosophical thought; and create innumerable problems relating to the nature and meaning of value, especially in jurisprudence.¹⁷

3.1.2 Matters of Fact and Relation of Ideas

For Hume, the only judgments that can be reasoned about are those that are capable of being empirically observed through direct experience. Such distinctions expressly exclude value (moral) judgments, which are to be understood as sentiment or feeling. However, while Hume was a skeptic about rational moral knowledge, he was a significant moral thinker.¹⁸ He held that morality could not correspond to sense impressions, and therefore this kind of knowledge was not amenable to empirical verification. But he did not believe that the investigation of morality was meaningless (as the later logical positivists did). Rather, he thought that moral knowledge could only be described as patterns of subjective emotion. As an empiricist, Hume focused on the way that the mind (reason) could verify knowledge gained through the senses. For him, knowledge could be gained objectively (truthful) as propositions that are true by virtue of their meaning alone (relation of ideas), and as propositions that are true by how their meaning relates to empirically observable natural facts about the world (matters of fact).¹⁹ In this way, Hume anticipated the analytic-synthetic distinction²⁰ that Kant would develop: a distinction (some call a dichotomy) that also features as a central tenet in the philosophy of the logical positivists.

3.1.3 The Is-Ought Problem

In terms of jurisprudence, it is probably Hume's is-ought problem that has the most direct effect on the way that values are discussed in legal thought. The is-ought problem, which is also called Hume's Guillotine or Hume's law,²¹

emotions are distinct faculties, and that the foundations of morality lie in sentiment, not reason. This view is also sometime called ethical sentimentalism.

¹⁷ The reason for this lies in two observations that Hume made famous. First, that empirical knowledge is derived from sense impressions, and secondly, that moral knowledge is derived from the 'passions' and is not capable of being reasoned about. Combined, moral knowledge is neither capable of reasoned thought nor empirical verification. This does not leave much room for knowing values (moral truths) in any objective or factual manner.

¹⁸ Putnam, *supra* note 9 at p. 29.

¹⁹ He did not believe that moral judgments could ever fall within these two categories.

²⁰ This distinction will be detailed below. Briefly speaking, analytic truths correspond with relation of ideas and synthetic truths correspond with matters of fact. The key issue in the analytic-synthetic distinction is that value knowledge is not capable of either synthetic or analytic knowledge.

²¹ "In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a

would later morph into the fact-value dichotomy.²² Essentially, the is-ought problem is stated as the claim that no ‘ought’ statement can be derived from a statement of what ‘is.’ In moral thought (and for that matter, legal thought), the is-ought problem states that no descriptive statement or proposition about what ‘is’ the case can ever turn into a prescriptive or normative statement about what ‘ought’ to be the case. From this idea, it becomes readily apparent that a proposition of this type correlates with the idea in jurisprudence that analytic (descriptive) jurisprudence is a distinct enterprise from normative (prescriptive) jurisprudence – and never should such paths of inquiry cross.

However, if one looks at the is-ought problem in the context of Humean philosophy in general, it seems quite obvious that what Hume was discussing was quite different than the way the is-ought problem is discussed in jurisprudential thought. Hume was a moral skeptic, holding that moral or ethical values cannot be reasoned about because they do not meet the prerequisite of either analytic (relation of ideas) or synthetic (matters of fact) facts.²³ This means that, according to Hume, there can be no valid descriptions of what ‘is’ morality; and therefore no ‘ought’ statements either. Without an ‘is’ statement there is no way to express an ‘ought’ statement about it. This understanding of the is-ought problem in the context of Hume’s moral philosophy seems plausible: he claims that there is no such thing as objective moral knowledge. Despite this dim view of moral knowledge, the is-ought problem (as the fact-value dichotomy) will present more substantial problems for moral knowledge when rational theories about morality emerge; and actual knowledge about value judgments (either in the mind – cognitively, or in the world – naturally) becomes possible according to these theories.

3.2 The Rational (Re)Turn

While sentimentalism and empiricism developed as a philosophical account of ethics, epistemology, and ontology in Britain,²⁴ the German thinker Immanuel Kant was developing a strong philosophical rebuttal to Hume’s moral

God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, ’tis necessary that it should be observed and explained; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.” Hume, *supra* note 14.

²² Putnam, *supra* note 9 at p. 28.

²³ *Id.* at p. 16.

²⁴ See Stephen Priest (1990). *The British Empiricists*. New York, Penguin Books.

skepticism, rooted in the centrality of the human mind's ability to think rationally. Kant presents a return to rationality²⁵ and its potential for gaining knowledge about value (including moral and ethical) judgments in a manner that can be formulated objectively and universally as cognitive processes of the reasoning mind. Kant sought to unite reason and experience in a way that could move beyond the skeptical conclusions about morality advanced by the empiricists. Kant argued that knowledge from experience is purely subjective without first being processed by reason. One cannot understand experience without the faculty of reason presupposing it. He claimed to present a Copernican Revolution in reverse, stating that:

up to now it has been assumed that all our cognition [reason] must conform to the objects [experience]; but . . . let us once try whether we do not get farther with the problems of metaphysics by assuming that the objects must conform to our cognition.²⁶

While such a claim may have gone too far,²⁷ the idea that moral statements can be rationally justified has had lasting sway. Kant divided his projects about ontology and epistemology in two ways: 1) the *Critique of Pure Reason*²⁸ (analytic and synthetic truths) and 2) the *Critique of Practical Reason*²⁹ (moral and ethical truths).

Pure reason is that knowledge that can be derived from empirical experience and upon which truth claims follow. These are the famous analytic and synthetic truths. Analytic propositions are true by virtue of their meaning alone (relations of ideas). These are those types of propositions that relate to ideas, such as all triangles have three sides. Synthetic propositions on the other hand are true by how their meaning relates to the world (matters of fact). For example, the fact that all main sequence stars are red is something that is observational verifiable, and as such qualifies as a synthetic judgment. In modern thought, these are generally considered to be what one calls facts.

²⁵ From the earlier work of continental philosophers such as Rene Descartes.

²⁶ Immanuel Kant [1781](1998). *Critique of Pure Reason*, translated by Paul Guyer & Allen Wood. Cambridge, CUP, p. 110.

²⁷ The reason why it may have gone too far is that the pendulum swings so far in the direction of cognition for Kant that experience from the world is marginalized (the opposite of the empiricists and their dim view of what knowledge cognitive thought could produce). Furthermore, "[w]hile there are some distinguished moral philosophers (e.g. Barbara Herman and Christine Korsgaard) who think Kant's account – at least as reconstructed by John Rawls – is fundamentally right, most philosophers today find Kant's moral philosophy overly dependent on the rest of Kant's metaphysics, which few if any philosophers are able any longer to accept." Putnam, *supra* note 9 at p. 17.

²⁸ Kant, *supra* note 26.

²⁹ Immanuel Kant [1788](2004). *Critique of Practical Reason*, translated by Thomas Abbott. New York, Dover Publications. The *Critique of Practical Reason* is a standalone work, but is also responding to his earlier works. See Immanuel Kant [1785](2002). *Groundwork for the Metaphysics of Morals*, translated by Allen Wood. New Haven, Yale University Press.

Practical reason, on the other hand, is the faculty of the reasoning mind that allows us to decide how to act.³⁰ For Kant, moral and ethical propositions were not analytic or synthetic, but were nonetheless capable of being objectively true. The primary tool he employs to demonstrate the objectivity of moral knowledge is through the categorical imperative. This notion holds that one must “act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction.”³¹ The categorical imperative is typically seen as the way of evaluating motivations for action. In this way, Kant is stating that a moral maxim must be universally valid and can be applied to any rational being. Such an imperative is not found in the subjective preferences of individuals, but exists universally in all rational beings thinking properly.

Facts, for Kant, are possible through a mixture of empiricism and rationalism (somewhat similar to Hume, but with an increased emphasis on the rational over the natural). Values, which Kant calls morals or ethics, are possible through reason alone (they are not natural entities existing in the world). In both cases, objective knowledge is possible. In terms of value knowledge, this is significantly different than Hume. Hume believes that value knowledge (he also uses the term morals and not the broader category of values) is neither rationally knowable nor empirically knowable as facts. This means that his is-ought problem has therefore been largely misconstrued in modern thought.³² The is-ought problem claims that a description of how the world ‘ought’ to be cannot be derived from a description of how the world ‘is.’ However, this statement is confined to what Hume would call sense impressions (the focus of his empirical knowledge). His is-ought problem is not making any claims for determining objective moral knowledge because he does not believe that either what ‘is’ moral or what ‘ought’ to be moral can ever be objectively known (no analytic or synthetic facts about morality exist).

Under the Kantian view, however, the is-ought distinction becomes more problematic because of the way Kant constructs moral knowledge in the mind. While he would agree with Hume that there are no empirically observable facts about morality that are analytic and synthetic, there are rationally observable facts about morality that are objectively knowable. This means that a rational description of what ‘is’ moral can clearly inform how one ‘ought’ to act. Many critics of this view would hold that this is deriving an ‘ought’ from an ‘ought.’³³ However, that is precisely the point: neither Kant nor Hume believed that there are analytic or synthetic facts about morality that are knowable. So, the idea that there is no fact to inform our moral actions is not telling us anything

³⁰ Kant’s ethical view is called deontological ethics. This is the normative ethical position that judges the morality of an action based on the actions’ adherence to a rule or rules.

³¹ *Groundwork for the Metaphysics of Morals*, supra note 29 at p. 421.

³² Putnam, supra note 9 at p. 28.

³³ Id. at p. 14.

about the possibility of the human mind to objectively know what one 'ought' to do.

3.3 Hegelian Subjectivity

Before turning to the work of the logical positivists of the late nineteenth and early twentieth century, and how their construction of the world essentially halted the possibility of objective value knowledge (particularly ethical knowledge), a brief mention of GWF Hegel is necessary. Hegel and other so-called German idealists essentially claimed that ontological reality, as one can know it, is fundamentally mental, mentally constructed, or otherwise immaterial. Epistemologically, idealism manifests as skepticism about the possibility of knowing a mind-independent thing existing in the external world.³⁴ In terms of moral and ethical knowledge, the idealists can generally be seen as extending the Kantian project to its rational extreme.³⁵ While Kant is skeptical about a mind-independent world, the idealists are generally considered to be antirealists about a mind-independent world.³⁶ This metaphysical view claimed that, while the Kantian idea about a Copernican revolution in reverse is accurate, the inability to trust our senses in determining an objective reality outside of our mind means that the only reality one can know is internal to the self, not external to the self.³⁷

For the idealist, this means that knowledge is inherently subjective because there is no external reality to which an internal objective reality can correspond (as Kant believed). The question for the idealist at this point is to ask how knowledge can be gained given such a subjective predicament. One of Hegel's solutions to this problem was to claim that ethical or moral knowledge existed in the idea of an objective spirit.³⁸ The idea of an objective spirit is found in knowing the collective (shared) subjectivities about morality in a particular context.³⁹ Hegel is also attributed to a school of thought called

³⁴ The philosophical meaning of idealism here is that the properties discovered in objects depend on the way that those objects appear to perceiving subjects, and not something they possess 'in themselves,' apart from our experience of them. The question of what properties a thing might have independently of the mind is considered an incoherent concept for idealism.

³⁵ This is the mainstream view about German idealism as "essentially the culmination of the Cartesian tradition," which is usually accompanied by "a seductively simple narrative" that makes it "the gradual and inevitable completion of Kant's 'Copernican Revolution.'" Fredrick Beiser (2002). *German Idealism: The Struggle against Subjectivism, 1781-1800*. Cambridge, Harvard University Press, pp. 1-2.

³⁶ Generally speaking, this means that they refuted the possibility that the world (external reality) is anything more than what the mind (reason) can comprehend.

³⁷ This is the complete antithesis of Humean empiricism.

³⁸ The objective spirit is another word for one's culture. One is born into a social relation that presupposes culture. Knowing ethical or moral obligations requires knowing the collective spirit of one's culture.

³⁹ "It is thus that Hegel has effected (sic) the transition from a phenomenology of 'subjective mind,' as it were, to one of 'objective spirit,' thought of as culturally distinct patterns of social

historicism. The historicist position of Hegel, combined with the notion of spirit, claimed that any human society and all human activities are defined by their history, and that only through understanding such histories (cultural development over time) can one know how to act morally and ethically.⁴⁰ Famously, this concept is embodied by the term *zeitgeist*, although Hegel himself never used this word.⁴¹ The *zeitgeist*, when used to explain Hegelian thought, is the total reality that is an inherent unity of mind and represents the concrete embodiment of social processes and actions. In terms of gaining knowledge about such a subjective, mystical, and vague concept, Hegelian philosophy did no favors for those seeking answers about the world and how human beings engage it. As such, an idea like the *zeitgeist* or objective spirit would become easy fodder for the logical positivists (and other forms of analytic philosophy that followed the idealists).

3.4 The Logical Positivists

The late nineteenth century and the early twentieth century saw great advances in scientific knowledge, and in turn, spawned philosophical movements about how truth about the world could be determined in light of such advances. Central to this is enterprise is a group of thinkers that came to be known as the logical positivists.⁴² The goal of their project was to determine what types of knowledge were possible for accurately describing the state of the world and human interaction within it.⁴³ The logical positivists, also called the Vienna Circle, provided an early example of the burgeoning field of analytic philosophy:⁴⁴ a type of philosophic inquiry that would be highly influential

interaction analyzed in terms of the patterns of reciprocal recognition they embody.” Paul Redding (2012). *Georg Wilhelm Friedrich Hegel*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/entries/hegel> (last accessed 1 September 2013).

⁴⁰ Whether such a conception can ever be known objectively is open to debate, but the Hegelian view is that this process can produce real objective knowledge about morality.

⁴¹ Instead, Hegel uses the phrase ‘*der Geist seiner Zeit*’ (the spirit of his time). For example, in his *Lectures on the History of Philosophy*, he says “no man can overleap his own time, for the spirit of his time is also his spirit.” See Glenn Magee (2011). *The Hegel Dictionary*. London, Continuum International, p. 262.

⁴² Logical positivism (also known as logical empiricism, scientific philosophy, and neo-positivism) is a philosophy that combines empiricism – the idea that observational evidence is indispensable for knowledge – with a version of rationalism incorporating mathematical and logico-linguistic constructs and deductions of epistemology.

⁴³ And to limit inquiry only to those categories of knowledge that were deemed as capable of truth.

⁴⁴ As described by Bertrand Russell, “[m]odern analytical empiricism . . . differs from that of Locke, Berkeley, and Hume by its incorporation of mathematics and its development of a powerful logical technique. It is thus able, in regard to certain problems, to achieve definite answers, which have the quality of science rather than of philosophy. It has the advantage, as compared with the philosophies of the system-builders, of being able to tackle its problems one at a time, instead of having to invent at one stroke a block theory of the whole universe. Its methods, in this respect, resemble those of science. I have no doubt that, in so far as philosophical knowledge is possible, it is by such methods that it must be sought; I have also no

through most of the twentieth century. It is also within this broader philosophic context that the work in positivist jurisprudence entered a renaissance. The two greatest legal positivists of the twentieth century, HLA Hart⁴⁵ and Hans Kelsen,⁴⁶ derive some of their positions on the nature of law from the broader philosophical project of the logical positivists.⁴⁷

The focus of the logical positivists centered on what the cognitive processes of the mind were able to tell us about the external world. Drawing heavily on Humean thought, the logical positivist famously held that knowledge about morality and ethics was a ‘nonsense,’ and therefore cognitively meaningless.⁴⁸ Such a view is not skeptical about moral knowledge, rather it posits that there is nothing to know about morality and ethics. This turns out to be an extreme view of Humean emotivism (nonscognitivism), and a clear rejection of Kantian rationalism (at least in terms of his ideas about the rational mind and its capacity to know universal moral and ethical truths).

For the purposes of this work, there is almost nothing that the logical positivists can tell us about the nature of moral knowledge. However, their position on such knowledge is wholly important in understanding why value knowledge has been so challenged in the last one hundred years. While the outlook of the logical positivists was effectively dismantled in the mid-twentieth century by the pragmatists,⁴⁹ its legacy in jurisprudence and the social sciences persists.

So what is the philosophy of the logical positivists? Generally speaking, it is a philosophic outlook that combines empiricism with a version of rationalism. In a way this is very similar to the Kantian project; however, it is much more limited than Kant’s attempt at a comprehensive approach (that is, it did not concern itself with Kant’s philosophic projects on morality and aesthetics). The logical positivists were interested in nailing down just what empirical observations could be the object of rational knowledge. It is at this point that they attempted to purge all ethical and moral thought from their project. By both embracing Humean skepticism and being totally dissatisfied with the

doubt that, by these methods, many ancient problems are completely soluble.” Bertrand Russell (1945). *A History of Western Philosophy*. New York, Simon & Schuster, p. 834.

⁴⁵ HLA Hart [1961](1997). *The Concept of Law*, edited by Joseph Raz. Oxford, Clarendon Press.

⁴⁶ Hans Kelsen [1960](2009). *Pure Theory of Law*, translated by Max Knight. New Jersey, Law Book Exchange.

⁴⁷ Specifically, Kelsen sought to create a legal science that would provide a foundation for all law as based on a science of norms that could be derived a priori with no element of evaluation. Hart, sought to create a legal positivism within the broader framework of analytic philosophy.

⁴⁸ Putnam, *supra* note 9 at p. 24.

⁴⁹ See WVO Quine (1951). *Two Dogmas of Empiricism*. *Philosophical Review*. Vol. 60, p. 20. This article, which is considered by many as one of the most important articles in twentieth century philosophy, attacked two propositions by the logical positivists. One, that the analytic-synthetic distinction collapses under scrutiny and two, that analytic truths (relation of ideas) could not meet the verification theory of meaning (that all meaningful statements have to correspond with direct experience).

project of the idealists – and their focus on knowing historical subjectivities as a basis for ethical knowledge – the logical positivists did not take a skeptical view about ethical knowledge, rather they claimed such thought was cognitively meaningless. That is, there is absolutely nothing to know about the objective truth of ethical or moral thought.

The logical positivists introduced a tripartite classification for all putative judgments.⁵⁰ They claimed there were analytic and synthetic judgments that were cognitively meaningful and all ethical, metaphysical, and aesthetic judgments which were cognitively meaningless. According to the logical positivists, analytic statements are those that are true or false on the basis of logical rules alone; and synthetic statements are those that are empirically verifiable or falsifiable.⁵¹ All other types of judgments that did not meet the criteria of an analytic or synthetic judgments were not capable of knowledge.⁵² What they failed to realize is that the criteria for determining what was cognitively knowable and what was cognitively unknowable was not determinable by the very criteria that they set for themselves.⁵³ That is, what should be considered a cognitively meaningful judgment and what should be considered a cognitively meaningless judgment is neither empirically nor logically verifiable.

3.5 The Philosophy of Pragmatism

In attempting to purge all knowledge about judgments not factual,⁵⁴ the logical positivists provided a good starting point for another philosophic tradition developing around the same time: pragmatism. Pragmatism is a broad philosophical orientation that emerged in many forms and covers many subjects. However, pragmatism can be seen as a counter argument to almost all of the projects in the analytic tradition of philosophy (such as that of the logical positivists). For the purposes of this work, the ideas encased in pragmatism provide philosophical support for nonpositivism in the social sciences generally, and in legal thought specifically.

In same way that there are a number of corollaries between logical positivism and legal positivism,⁵⁵ there are a number of corollaries between pragmatism

⁵⁰ Putnam, *supra* note 9 at p. 10.

⁵¹ *Id.*

⁵² *Id.*

⁵³ A major tenet of the logical positivists was in the verifiability criterion of meaning. A statement or question is only legitimate if there is a way to determine if a statement is true or false. However, this criterion is itself not verifiable. It is self-refuting.

⁵⁴ Factual here is defined as how the logical positivists restricted it: analytic and synthetic judgments.

⁵⁵ This is a claim that legal positivists still hold that the verifiability of law properly so called can be determined exclusively of any form of evaluation or evaluative criteria (whether it be of the moral type or not).

and legal nonpositivism. The project of the legal positivists, and their insistence on a dichotomy between law and morality, closely mirrors the dichotomy between meaningful (analytic and synthetic truths) and meaningless statements (ethical, aesthetic, and metaphysical truths) made by the logical positivists. The pragmatists not only reject this dichotomy, they also rejected the analytic-synthetic dichotomy (the universe of meaningful statements, according to the logical positivists). One of the underlying themes in pragmatic philosophy is that of holism: the idea that truth and knowledge cannot always be reduced to absolute categories. This holism is also a characteristic of much of legal nonpositivist thought.

In many ways, pragmatist thought is a critical approach to knowledge and truth. It is this critical orientation that makes pragmatism difficult to categorize. Much of pragmatic thought is aimed at challenging the rigid dogmas of the Western philosophic tradition. As such, pragmatic thought takes many forms: from those pragmatists who believe that truth is possible to those who believe that the fallibility of our knowledge leads us to the conclusion that there can never be any certainty about truth (for example, the work of contemporary neopragmatist Richard Rorty).⁵⁶ Generally speaking, however, pragmatism is characterized by four interrelated theses:

- (1) antiskepticism: the pragmatists hold that doubt requires justification as much as belief; (2) fallibilism: pragmatists hold that there is never a metaphysical guarantee to be had that such-and-such a belief will never need revision; (3) the thesis that there is no fundamental distinction between 'facts' and 'values,' and (4) the thesis that, in a certain sense, practice is primary in philosophy.⁵⁷

This view provides a strong basis for rejecting the outlook of the logical positivists in regard to both epistemology and ontology. As such, the pragmatic theory of truth is rooted in the idea that knowledge of the self and world is possible, but that one must free themselves from traditional philosophic dogma in order to determine such truth.⁵⁸ This means that the restricted approach of the empiricists (and later, the logical positivists) about observation

⁵⁶ "Truth cannot be out there cannot exist independently of the human mind because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own unaided by the describing activities of humans cannot." Richard Rorty (1989). *Contingency, Irony, and Solidarity*. Cambridge, CUP, p. 5.

⁵⁷ Hilary Putnam (1994). 'Pragmatism and Moral Objectivity,' in James Conant, ed. *Words and Life*. Cambridge, Harvard University Press, p. 152.

⁵⁸ The pragmatic theory of truth varies according to some of its early expositors, such as Charles Peirce, William James, John Dewey, and George Mead, but there are some common features including: a reliance on the pragmatic maxim ("consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object"), and an emphasis on the fact that the product of belief, certainty, knowledge and truth is the result of a process of inquiry. Charles Peirce (1992 & 1999). *The Essential Peirce: Volumes I & II*. Bloomington, Indiana University Press, p. 107.

and verifiability left much knowledge about the mind and the world outside the realm of inquiry. Likewise, the pragmatists saw the projects of Kant and the later idealists as excessively reason-dependent, and that their goal of seeking absolute (metaphysical) truth about morality was misguided and largely unnecessary.⁵⁹

According to John Dewey, a leading early American pragmatist:

the best definition of truth from the logical standpoint which is known to me is that by
Pierce: '[t]he opinion which is fated to be ultimately agreed to by all who investigate we
mean by the truth, and the object represented in this opinion is the real.'⁶⁰

Essentially, the pragmatist project sets the goal of determining what is to be known about the world and the mind in terms of a process of inquiry.⁶¹ Such a process of inquiry relies heavily on the ability of reason to assist in determining truth; and reasoning requires evaluation. The pragmatists have long demonstrated that the process of inquiry required to describe facts (both matters of fact and relation of ideas) requires evaluation.⁶² In this way, fact and value knowledge are entangled (that is, the process of inquiry for knowing both facts and values requires descriptive and evaluative components). Under this view, both factual (seen as existing externally) and value (seen as existing internally) knowledge is obtainable, and that while both modes of inquiry are not absolute metaphysically, knowledge about them is possible epistemologically. It is this core practicality that provides the basis for this work, and which will be developed in the context of law and the social sciences in the following Chapters.

From a commonsense perspective, the logical positivists and their rejection of the possibility of moral knowledge seems untenable. Even if moral knowledge is subjective in the negative sense (akin to a mere utterance), there is still knowledge that can be gained about such utterances; maybe not in any metaphysical sense (as truthapt propositions, for example), but certainly such utterances can be described. Furthermore, the logical positivists also failed to understand the structure of values and valuing more generally.⁶³ Instead, they focused their attention on how to banish ethical judgments from scientific thought. In fact, as the neopragmatist Hilary Putnam has point out, the

⁵⁹ See Hilary Putnam (2005). *Ethics without Ontology*. Cambridge, Harvard University Press.

⁶⁰ John Dewey [1938](2008). *Logic: The Theory of Inquiry*. New York, Read Books, n. 348.

⁶¹ This process is applicable to both fact and value inquiry. This is the "the principle that Ruth Anna Putnam and I [Hilary Putnam] have attributed to John Dewey, the principle that 'what applies to inquiry in general applies to ethical inquiry in particular.'" Putnam, *supra* note 9 at p. 133.

⁶² Putnam, *supra* note 9 at p. 9.

⁶³ Morality and ethics are but subcategories of the larger category of value. The concept of values and valuing includes all concepts that are evaluative. This includes epistemic values as well. These are values commonly needed to describe facts. Values such as simplicity, compatibility, reasonableness, and the like are values. They may not be moral in type, but they are values nonetheless.

leading logical positivist Rudolf Carnap never speaks of value judgments but only of regulative ethics.⁶⁴ All discussion about cognitively meaningless judgments is targeted at ethical and moral thought.⁶⁵ According to Putnam:

[e]ver since Hume, the fact that there are many types of value judgments that are not themselves of an ethical (or 'moral') variety tends to get sidelined in philosophic discussions of the relation between (so-called) values and (so-called) facts.⁶⁶

He goes on to explain the reason for such a limited definition of value judgments by stating:

[the positivists'] real target is the supposed objectivity or rationality of ethics, and in disposing of this topic, they take themselves to have provided an account that covers all other kinds of value judgments as well.⁶⁷

This confusion about what types of values are permitted to influence inquiry into knowing facts is widespread. It presents challenges for gaining value knowledge because it separates values into false dichotomies. While moral and ethical values are indeed distinct from other types of values, all values rest on their relative valuableness. In this way, moral values are structurally indistinguishable from cognitive values. A cognitive or epistemic value (such as simplicity or neutrality) is evaluated in terms of its value in the same ways as is the valuableness of a moral value (such as equality or liberty).

3.6 The Entanglement of Fact and Value

All combined, the pragmatists provide a solid foundation for value (not just moral) inquiry generally. A central tenet of the pragmatist (and neopragmatist) project is the entanglement of fact and value.⁶⁸ This entanglement is critical to value knowledge because, if correct, it means that the processes of inquiry for deriving facts is not fundamentally dichotomous from the processes of inquiry for determining values. Furthermore, if the entanglement thesis is correct, the interaction of facts and value represent a symbiotic relationship whereby each requires the other if one is to properly understand the world and the mind. This outlook views inquiry as a form of holism that attempts to reconcile the empiricism of Hume and the rationalism of Kant. It creates a vision of the world and the mind that is both knowable and uncertain. While this may seem like a contradiction in terms, it bears out in practice. Neither factual

⁶⁴ Putnam, *supra* note 9.

⁶⁵ This is a common feature in both the philosophy of science and the philosophy of law. Value discourse is limited to morality and how and 'objective' science or law can be determined in a value-free manner. However, value-free generally means moral-free.

⁶⁶ Putnam, *supra* note 9.

⁶⁷ *Id.*

⁶⁸ *Id.* at p. 28.

knowledge nor moral knowledge is insulated from the need for revision and reflection. There are countless scientifically factual truths that have been considered infallible, only to be debunked at a later point.

The same can be stated about moral truths. If one combines the entanglement thesis with that of fallibilism, the outcome is a philosophic outlook claiming that absolute truth should not be the focus of inquiry, but that improved knowledge (about both facts and values) should be. This is the approach taken in this work: a distinction between epistemology and ontology in terms of advancing what there is to know about values. If one claims that there is no absolute truth and certainty about the factual world, that there is nothing fundamentally distinct between how facts and values become known, and that knowledge of facts and knowledge of values are entangled, then it follows that the same metaphysical uncertainty about facts would apply to values as well. Such a claim does not prevent us from improving factual knowledge (this is the entire enterprise of what is called science). It should likewise not prevent us from attempting to improve value knowledge as well.

4. THE PHILOSOPHY OF VALUES

Turning from the philosophic history of the debate about the objectivity of fact and the subjectivity of value, the following sections will highlight the way that moral philosophers think about values; and how the various theories about the nature and the content of values hinder or enhance the possibility of value knowledge. In the context of this work, and specifically in reference to the idea that elements of moral and political thought can be analytically understood in jurisprudence, the concepts of what one labels subjectivity and objectivity becomes especially important. If, for example, all subjective knowledge is attributable to our understanding of values, and that all value knowledge is subjective, then jurisprudential projects that focus on the understanding of objective and natural factual knowledge will hold that all value considerations fall outside the scope of jurisprudential knowledge whatsoever.

The goal of this work is to challenge this view, and to provide a theory for understanding value judgments as shared subjectivities. These shared subjectivities are the product of inquiry holding that absolute metaphysical truth about the existence of values (including morality, ethics, and politics) remains an open question. However, at the same time, the possibilities for understanding the process by which the self makes valuations using its rational faculties are real. This means that what is valued in a particular context can be evaluated as points of overlap among individuals who are reflecting rationally about moral and ethical propositions (or any other type of value). For this work, values are subjective in two important ways: 1) they do not exist external to the self as naturalized entities, and 2) they are not

capable of being discovered as absolute truths (ontological). However, despite this limitations, it is claimed in this work that values can be reflected upon as shared outcomes of thought processes such as what is typically called right reason (legal or otherwise). In other words, real knowledge about value is obtainable.

4.1 The Concept of Values

The concept of value is a complicated endeavor. A value (noun) and the process of evaluating (verb) both fall within the domain of value knowledge. Generally speaking, a value is some kind of entity that is valued. Their essence cannot be evaluated in absolute descriptive terms. The first question is to ask whether values exist at all (ontological inquiry), and if they do, how does one come to understand them (epistemic inquiry). In many ways, this type of discussion mirrors the primary project of conceptual legal theorists. Central to this project is inquiry about the concept of law: what is the phenomenon called law, does it exist, and how can it be verified and validated? For conceptual legal positivists, the concept of law can be understood scientifically without recourse to moral evaluation. Most conceptual legal nonpositivists (essentially those of the natural law school) believe that the concept of the law can only be known through an evaluation of its justness (usually as a form of reasonableness). And that this justness, while a metavalue, is objectively knowable.

This conceptualization has many corollaries to Kantian moral philosophy (at least in terms of understanding the concept of morality). For Kant, the grounding of objective morality requires reduction to a base maxim that provides for the authority of morals to bind. Interestingly, the Hartian rule of recognition and the Kelsenian basic norm also seek to provide a nonreducible maxim for understanding the authority of law to bind in absolute terms. However, for the legal positivists, the derivation of a base maxim can be exclusively achieved through the tools of inquiry developed by the logical positivists. Legal positivists as far back as Jeremy Bentham believe that this maxim is derived with no recourse to moral evaluation; and that the truth about the concept of the law can be derived from what the logical positivists call facts (analytic or synthetic truths). As has been demonstrated in previous sections though, the understanding of how facts are verified according to the logical positivists is flawed.

The pragmatists, such as Quine and Putnam, have shown that the basis upon which the logical positivists (and the legal positivists) understand facts is not sustainable.⁶⁹ They have shown that not all analytic truths are amenable to

⁶⁹ See Putnam, *supra* note 9.

empirical evidence and that the verification theory of meaning requires evaluative components. This collapse of the analytic-synthetic dichotomy and the fact-value dichotomy demonstrates that the entire positivist project in the social sciences is built on assumptions in the physical sciences that are not sustainable under scrutiny.

In terms of understanding the concept and structure of value, the entanglement of description and evaluation is important. It is important because it deflates the ideas of objectivity and subjectivity as they relate to fact and value inquiry. One must make value determinations (even if they are cognitive or epistemic values like unity, simplicity, and the like) in making descriptions. Under such an understanding, objective fact requires subjective value. Does this undermine the way that objectivity is understood? Does it mean that nothing is capable of objectivity, or does it mean that objectivity and subjectivity – as they are commonly understood – are incomplete ways of conceptualizing the differences between facts and values? This work takes the second approach. There are ways to understand facts as containing objective and subjective elements; and likewise there are ways of understanding values as containing objective and subjective components. This, however, does not mean that the subjective components are unknowable. The next sections will look at ways of understanding the concept and structure of value that is based on the intertwined categorization of what is called objective and subjective.

4.1.1 Value Epistemology and Value Ontology

For this work, the dissecting of value knowledge from value truth is so central that it constituted a section in the introductory Chapter. While it is of course the case that these two philosophic foci of inquiry are interrelated, they produce distinct sets of questions that can be answered (in some ways) independently of the other. As stated in the previous Chapter, epistemology refers to how things (both material and nonmaterial) can be known; and ontology (metaphysics) refers to what is there to know. In the context of both factual inquiry and value inquiry, there is a difference between epistemic inquiry and ontological inquiry.

A good analogy for understanding this distinction is that of dark matter. Dark matter is one of the greatest puzzles in science generally. It meets the requirements of a synthetic judgment as understood by the logical positivists in that it relates to a matter of fact (probably). It is probably a matter of fact because it is external to the self and it is thought to be amenable to empirical observation through the senses. Yet, no one knows definitively what it is; nor does anyone know how to regard its existence metaphysically. In the case of dark matter, the epistemic tools employed are generally those found in particle physics; and while a description of what is dark matter eludes, scientists

nonetheless continue to seek knowledge about it. What is it about dark matter that makes us so antiskeptical about scientific inquiry and so skeptical about value inquiry?

While there is no simple answer to this question, a preliminary proposal is to claim that the pursuit of scientific knowledge is worthwhile because it is more truthapt than value knowledge, and therefore, while absolute scientific knowledge is elusive, there is also the belief that such absolute knowledge is possible. Value knowledge is assumed to be incapable of absolute truth and that no matter how much energy is exerted in gaining value knowledge, there will never be a metaphysical truth about values that will emerge. In other words, it is a futile enterprise. While this may be a popular view about the truth existence of values, it is a conceptualization that also reduces the attractiveness of epistemic inquiry. The example of dark matter is intended to demonstrate: 1) that metaphysical certainty in the sciences does not foreclose epistemological inquiry, 2) that metaphysical skepticism in regard to values is distinct from the project of epistemological inquiry about values, and 3) that the pursuit of value knowledge should not be limited by questions of metaphysical uncertainty.

4.1.2 Three Possibilities

In terms of the concept of values, and in looking to distinguish between value ontology and value epistemology, there are three general possibilities for understanding values. This section will look at these three possibilities in relation to the theories that have been generated about value knowledge and value truth. Since most of the discourse has focused on moral knowledge versus scientific knowledge, these terms will be used to represent the philosophic inquiry into what one might call scientific fact and moral value.

The focus here is on value knowledge, and how different approaches to value knowledge can improve inquiry. The terms objective and subjective will be used in the following ways: objective and subjective will be used to distinguish 1) between mind-independent knowledge (objective) and mind-dependent knowledge (subjective), 2) between the capacity for universal metaphysical truth about value (objective) and metaphysical skepticism about value truth (subjective), 3) between natural entities (objective) and nonnatural entities (subjective), and 4) between cognitive capacity for rational knowledge (objective) and noncognitive emotivism (subjective).

These various ways of categorizing objectivity and subjectivity will have a direct correlation to a number of metaethical theories about the conceptual nature (existence) of morality specifically, and values generally. These theories include the following: moral realism, moral quasi-realism, and moral

antirealism;⁷⁰ moral cognitivism and noncognitivism;⁷¹ ethical naturalism and nonnaturalism;⁷² moral skepticism and antiskepticism;⁷³ moral rationalism;⁷⁴ moral sense theory and emotivism;⁷⁵ ethical subjectivism and moral intuitionism;⁷⁶ and moral error theory.⁷⁷

In addition to metaethical views about the existence of value, there are a few structural views that are also discussed. These include value universalism⁷⁸ and value relativity;⁷⁹ and value monism⁸⁰ and value plurality.⁸¹ All of these

⁷⁰ Moral realism is the metaethical view which claims that ethical sentences express propositions that are truthapt and those propositions are made true by objective features of the world. Some less robust forms of moral realism could be categorized as quasi-realism in that they believe that some moral propositions can indeed be true in the objective sense, but that these propositions do not exist as features of the world. Instead, ethical sentences project emotional attitudes as though they were real properties. This makes quasi-realism a form of noncognitivism. Antirealism rejects that moral propositions can be true, and they likewise reject the idea that moral propositions correspond to objective facts.

⁷¹ Moral cognitivism is the metaethical view that ethical sentences express propositions and can therefore be true or false. In many ways, moral cognitivism is compatible with moral realism. However, there are forms of moral cognitivism that do not rely on the need for moral entities to be mind-independent in order for them to be objectively true. Moral cognitivism is a mind-dependent theory. In this way, it has many similarities with Kantian moral rationalism. It rejects the idea that moral sentences merely state emotional attitudes. Most forms of moral noncognitivism claim that moral statements do not express propositions and thus cannot be true or false. This is the view of the logical positivists.

⁷² Ethical naturalism is an extreme form of moral realism that claims that moral propositions are capable of truth, they contain features independent of the mind, *and* these mind independent features can be reduced to some form of nonmoral features existing as naturalized entities in the world.

⁷³ Moral skepticism is a class of metaethical theories holding that no one has any moral knowledge. Moral skepticism comes in a variety of subclasses such as moral error theory, sentimentalism, moral antirealism, and moral noncognitivism. Moral skeptics hold that moral cannot be expressed as true or false statements. They are not truthapt. Most moral skeptics also hold that moral statements are neither mind-independent or mind-dependent. Instead, they hold that moral propositions merely state attitudes.

⁷⁴ Moral rationalism is a view in metaethics according to which moral truths (or at least general moral principles) are knowable a priori, by reason alone.

⁷⁵ Moral sense theory is the metaethical view holding that knowledge about morality is grounded in moral sentiments or emotions. Morality is not knowable through reason (either a priori or a posteriori). Emotivism is a metaethical view which claims that ethical sentences do not express propositions but emotional attitudes.

⁷⁶ Moral intuitionism is a view in metaethical holding there are objective facts of morality that are knowable, but that these evaluative facts cannot be reduced to natural facts, and that human beings have an intuitive awareness or knowledge of value that forms the foundation of ethical knowledge. An empiricist version of moral intuitionism is similar to that of moral sense theory, while a rationalist version is similar to that of moral cognitivism. Ethical subjectivism is a form of moral cognitivism and antiskepticism. It is a metaethical view that, while ethical sentences state attitudes, they are capable of being known as true through cognitive processes.

⁷⁷ Moral error theory is hyper-skeptical view about moral knowledge holding that all moral claims are false and that there is reason to believe that all moral arguments are false.

⁷⁸ Value universalism is a metaethical position holding that some system or ethics or morality applies universally to all similarly situated individuals. What is right or wrong for one individual is right or wrong for all individuals regardless of context. This theory is closely associated with those who believe that there are objective moral truths that exist.

⁷⁹ Value relativity is the metaethical view that moral or ethical truths differ according to context. This is the antithesis of value universality. Under such a view, nobody is objectively right or wrong when disagreeing about such-and-such belief. Value relativism can be the view that there

structural theories hold that values do indeed exist in some form, and that there is some knowledge that can be gained about them. While the metaethical views described above are normally confined to general philosophic inquiry, the structural questions about value also permeate social science discourse.

4.1.2.1 Objective-Objective

The objective-objective approach to value is one that would claim that values are real and naturalized entities that are capable of being known and verified as scientific facts. Furthermore, they are objective in the sense that they exist external to the self: that is, values exist ‘out there’ in the world and are capable of being known through empirical verification.⁸² This type of approach to value knowledge could be called moral realism or ethical naturalism. This approach is normally advocated by those seeking to claim that values (especially moral ones) can be known in the same way as scientific facts are known. That is, moral values are capable of being true, and that moral values are capable of empirical verification. If the objective-objective position is correct, then value knowledge could be determined in exactly the same way as factual knowledge. As mind-independent entities, values are determinable in the same way that the natural world is discoverable: through the process of experience based on empirical observation. In terms of value structure, this approach would likely endorse views on value universality and value plurality.

Criticism of the objective-objective approach typically comes in the form of ethical nonnaturalism. Primarily attributable to the what GE Moore calls the open question argument or the naturalistic fallacy, this idea holds that any attempt to identify morality with some set of observable natural properties will always be an open question (a question that cannot be deduced from the conceptual terms alone).⁸³ Another version of the naturalistic fallacy, which is not attributable to Moore, is the idea that one cannot attribute what is natural

is nothing objective to know about values because they can be applied in different ways by different cultures and communities, or it can be the view that there are objective moral truths, but the manner in which they are applied depend on particular contexts.

⁸⁰ Value monism is the view in metaethics holding that value systems (moral or otherwise) are cohesive and unitary. It is a view that value positions are mutually supporting and that there are no inherent conflicts among competing values.

⁸¹ Value pluralism is the view that there may be a number of particular values that are equally correct and fundamental, and yet they are incommensurable. A common example given for this phenomenon is between the values of liberty and equality in political thought. Each value is valuable, but they often cannot be reconciled with each other (at least in absolute terms) when applied in specific political systems.

⁸² This is akin to the category of synthetic truths that the logical positivists considered to be one of the main foci of meaningful (real) knowledge.

⁸³ Moore further argued that if this is true, then moral facts cannot be reduced to natural properties and that therefore ethical naturalism is false. See GE Moore [1903](2011). *Principia Ethica*. London, CreateSpace Publishing.

with what is good.⁸⁴ This form of the naturalistic fallacy is common in everyday use, and if it is true that there are no natural moral properties that describe goodness, then the reverse should hold: there is no property of goodness attributable to nature.

4.1.2.2 Subjective-Subjective

This is essentially the Humean view, which has been extended in the past century as forms of emotivism, noncognitivism, moral antirealism, and moral skepticism. It is a view that values do not exist metaphysically as either mind-dependent or mind-independent entities. It likewise holds that there is nothing epistemologically that can be known about values (especially moral and ethical ones). Rather, such a view holds values are incapable of rational reflection, and that value preferences merely indicate an desire, feeling, attitude, or emotion. This idea follows on Humean sentimentalism and is taken to its extreme by logical positivism and moral error theory. For these theorists, moral values are subjective all the way down. In terms of structure, this approach would endorse modest versions of value plurality and value relativism.

It is this view about moral values (and other values as well) that presents the greatest challenge for a theory based on the improvement of value knowledge (the focus of this work). This type of theory provides ample ammunition for those who attribute the most negative aspects of value subjectivity to advance positions advocating for its complete removal from any kind of objective inquiry. Under this view, values and valuation merely reflect an individual's attitude or feeling; and therefore, not only is there nothing objective to know about such utterances, there is nothing to know whatsoever (they are cognitively meaningless). However, the idea that moral values are cognitively meaningless is a fairly recent phenomenon and is not reflective of many skeptical views about moral epistemology. For example, behaviorism in psychology is of the belief that emotion and feeling are measurable as empirically verifiable human behaviors. While such a view is skeptical about whether emotion or desire is metaphysically truthapt, it is antiskeptical about the possibility for knowing such emotion or desire as empirically observable behavior.

⁸⁴ This similar to the naturalistic fallacy but is a more general proposition holding that it is false to attribute what is good with what is natural.

4.1.2.3 Objective-Subjective

Under this approach, moral values are mind-dependent (subjective) but they are objectively knowable through cognitive processes and rational thought.⁸⁵ In some ways, this is a version of the objective-objective approach because, like the moral realists, followers of Kantian moral rationality hold that moral propositions are capable of being truthapt. In other words, they are not metaphysically skeptical about the existence of values. However, where these positions differ is in relation to whether values exist as mind-independent entities. For the objective-subjective approach, knowledge about values is possible through cognitive processes of the mind alone. Under the Kantian view, moral value is ontologically objective (that is, truthapt) and epistemically subjective (that is, mind-dependent). This view is attributable to various forms of rational ethical intuitionism, ethical subjectivism, and moral cognitivism. Structurally speaking, this view would hold that values are capable of universality and relativity at the same time.⁸⁶ Likewise, and depending on how the objective-subjective approach is understood, the structure of values could be unitary (as a coherent system of mind) or as a plurality of various particular values.⁸⁷

A more modest form of the objective-subjective approach is the one advocated in this work. It is also a version of the position advanced by John Rawls and Christine Korsgaard. This view proposes that values can be reflected on, and justified by rational inquiry, but that there is no objective truth (ontologically speaking) that is necessarily attributable to such a claim.⁸⁸ Under this approach, values exist internal to the self (subjectively), and that while they are capable of self-reflection and rational scrutiny, they are only subjectively knowable in that values do not exist independent of the mind, and that they are not necessarily capable of absolute truth. In many ways, this outlook can be seen as the underlying rationale for Rawlsian political thought and metaethical constructivism.⁸⁹ Under these views, the goal of rational inquiry

⁸⁵ Some theorists might actually call these values as mind-independent (and therefore objective) because all reasonable and 'right' thinking minds would possess them. This work, however, prefers to call such commonly held values as mind-dependent shared subjectivities. For the mind-independent and objective view, see Matthew Kramer (2007). *Objectivity and the Rule of Law*. Cambridge, CUP.

⁸⁶ This is the view that the mind is capable of knowing value in a universal manner (i.e. across all human beings), but that the understanding of these values will differ according to context (i.e. they are relative to context).

⁸⁷ The seminal article on the distinction between value unity and plurality is Isaiah Berlin (1953). *The Hedgehog and the Fox*. London, Weidenfeld & Nicholson.

⁸⁸ However, Rawls does believe that there is a base set of objective principles of justice that all rational beings would agree to as a starting point. He calls this his 'thin theory of the good.' Such a theory sets a constitutive foundation upon which all other values can be determined by right thinking individuals. In this way, Rawls theory is both objective and subjective. In other words, he holds that there are two principles of justice that all rational beings would choose behind a 'veil of ignorance.' Once these limited, but objective and true, principles are delineated, all other values can be determined.

⁸⁹ Rawls, *supra* note 2.

about values is to provide a means for developing a picture of the moral landscape that is constructed by describing what values individuals with a properly functioning rational faculty would all agree.

This provides a sound basis for the idea of shared subjectivities and a theory of configurative fairness. What is valued remains a subjective and mind-dependent enterprise, but relies heavily on cognitive processes for rational argument, justification, and reflection. The outcome constitutes what individuals value. While this claim cannot prove that value claims are capable of truth, it can demonstrate that the process of value knowledge is not purely subjective in the negative sense (that is, value knowledge is *not* cognitively meaningless). The goal for knowledge under this approach is to determine where value subjectivities are shared across individuals. In terms of measurement and analysis, gaining knowledge about values under this type of rational configuration is distinct from that of behaviorism. It requires the researcher to be able to know empirically unobservable phenomena of the mind. The difficulty in knowing these unobservable phenomena of rational thought across individuals is precisely why the behaviorists limited their inquiry to those phenomena that presented themselves as observable behavior. However, advances in cognitive science and psychology provide new techniques for understanding these normally unobservable phenomena can be made empirically observable. Q methodology is one of these techniques.

4.2 The Content of Values

While the brief introduction into the debates on the conceptual and structural nature of values above will surely not exhaust the depth of inquiry or amount of ink that philosophers have spilled in discussing such topics, it is hoped that the view that the idea of subjectivity and its affiliation with value knowledge is not as straight forward as most legal philosophers would like to think it is. In moving on to the next set of ideas, which will have some overlap with discussions about the concept of values, the focus will shift away from epistemic and ontological questions and turn to more practical considerations about value types and categories. This section intends to expand one's ideas about what constitutes a value; and how values and valuation extend far beyond the boundaries of ethical and moral inquiry.

When one speaks of values, to what are they referring? The main problem in classifying values lies in their observability (or lack thereof). If one claims that values are entities, containing properties, then they should be amenable to observation and description; and yet sometimes they are not. While the idea of a moral fact may not exist as a naturalized entity like a natural fact, moral entities are – in many cases – amenable to rational reflection. Values present themselves in almost every field of thought (from mathematical values to

aesthetic values), and are not limited to moral or ethical inquiry. Take for example the value of coherence. In both law and science, the idea of coherence is a central concept. However, while there may be a way of evaluating a more or less coherent legal system or set of scientific theories, there is no means to describe coherence ontologically.

What then is the difference between the value of coherence and the value of liberty, for example? One is what is called a cognitive or epistemic value and the other is what is called a moral or political value. In the context of either individual or political liberty, the value of liberty can be evaluated against its ideal type in describing liberalness, but it is said that such an ideal type fails to exist ontologically. If both liberty and coherence are expressible in their ideal types, why then is the concept of liberty said to be a purely subjective value, while a concept of coherence is said to be a value capable of objectivity? The answer lies in the way that values are categorized.

4.2.1 Moral and Social Values

In later Chapters of this work, ideas about the relationship between jurisprudence and the metavalues of justice, fairness, and legitimacy will be explored. For many theories about justice, the value of human dignity holds central importance. Contemporary justice theorists often conceive of the project of justice in terms of its capacity to promote and secure human dignity. In terms of these broad overarching ideas, what types of values are being spoken about here? Are these ethical, moral, political, or even legal values? While it can be argued that all of these values have a moral component, it is the process of detailing their goals and aims that uncovers their types. As such, one way of looking at values is in terms of the goals that they seek to achieve (instrumental value), or the kind of action that they oblige (deontological value). For example, political values tell us how we ought to be governed; ethical values tell us how we ought to live; and moral values tell us how to treat each other. This is a purely instrumental or deontological view of value, however. It says little about the intrinsic worth of such values, but merely categorizes them against their ability to achieve some greater good such as the promotion of human flourishing or human dignity.

Many philosophers hold that values can also be intrinsically valuable: that is, they are valuable in and of themselves.⁹⁰ An intrinsic value is an end in its self. For example, a value that is derived from its inherent goodness could be viewed as an intrinsic value. Under such a view, one ought to act in compliance with such a value regardless of the goal that that value might be attempting to achieve. While there are a number of problems with such a

⁹⁰ Ben Bradley (2006). *Two Concepts of Intrinsic Value*. Ethical Theory & Moral Practice. Vol. 9, p. 111.

claim, the idea is that something that might be called an intrinsic value will be invariably connected with some idea of goodness – and thus often called moral. Moral and social values can be looked at from either an intrinsic (end in itself) or extrinsic (means to an ends) perspective. However, all moral and social values claim to guide human action in determining what is good or right. While ethics is often used as a term of art for describing philosophic inquiry about morality, it can also be used to describe personal values. Ethical values under such a view are those values that are employed to guide individual reflection about how to live a good life. These values usually relate to ideas about self-respect and taking one's life seriously: for instance, living a meaningful life.⁹¹

Moral values, while applicable to all determinations of what is right and wrong, can also be seen as those values guiding the way conscious beings should treat one another. At this very human level, ethical and moral values combine to inform conscious beings how to live and how to treat one another. Political and social values, on the other hand, describe the set of values aimed at human organization at the communal or societal level. Political and legal values, such as justice, fairness, legitimacy, equality, liberty, individualism, civic duty, and the like, are values aimed at the moral goodness or rightness of systems regulating human behavior in a social context. Social, cultural, and family values often relate to forms of political values, but focus primarily on belief systems and structures of social organization that fall outside the governance context.

In the context of jurisprudence, considerations about values usually take the form of controversies relating to the integration of moral value judgments in the decisions related to lawmaking, lawapplying, and most importantly: lawinterpreting. Determining the role of these political, social, and moral values in the context of legal decision and discourse is the focus of this work; and as such, questions about values and how they are intertwined into the understanding of jurisprudence become central points of inquiry. In this context, one is rarely talking about legal values per se when criticizing the so-called subjective elements of legal decision and discourse. Instead, they are criticizing the political, moral, and social values (and norms) that are injected into the law by decisionmakers. However, to complicate matters, the social context in which law operates often entails principles, norms, and rules that are a mixture of legal, political, and moral values.

Take for example the principle of good faith or of *pacta sunt servanda*. Each of these core legal principles contains values of the political and moral type. In looking to advance knowledge about these values in the context of law, the ability to dissect ideas and concepts into their constituent parts is important, although challenging. However, there are all types of value judgments that

⁹¹ See Ronald Dworkin (2011). *Justice for Hedgehogs*. Cambridge, Belknap Press.

tend to fall outside the scope of what are typically considered moral values. In social inquiry generally, and jurisprudence specifically, it is very difficult to clearly separate moral from nonmoral value judgments, and from legal and nonlegal (that is, moral or political) value judgments.

4.2.2 Epistemic Values are Values Too

It is often the case that when one speaks of values, it is a reference to ethics and morality. However, values enter the discourse in almost every context that requires inquiry and understanding. It is argued that description without understanding is meaningless, and that understanding requires evaluation. If this is true, then description requires evaluation which in turn requires knowing something about values. These values need not contain moral components (although, it is arguable that anything worth valuing includes a claim to its rightness or goodness). Examples of these types of values are what are called epistemic or cognitive values. These are the values – while distinct from moral values – are values nonetheless.⁹² In the law, one can think of values such as reasonableness, coherence, predictability, adaptability, stability, order, consistency, transparency, integrity, and the like.

These are examples of cognitive values that are used to make sense of observable legal phenomena. Scientific inquiry includes a similar set of values that make understanding of scientific fact possible.⁹³ What then is one to make of these types of values? Why is the coherence of the law considered descriptively possible, but the justness of the law is not? The answer may lie in that justice is assessing the goodness or rightness of a law or legal system, and that coherence is not. Philosophically speaking however, there does not seem to be a fundamental conceptual difference. This is not to say that making a distinction between the two is not helpful. It is just claiming that the pursuit of legal coherence and the pursuit of legal justice may be descriptively possible according to a similar set of criteria.

5. GAINING KNOWLEDGE ABOUT VALUES

This Chapter focused on the general character of facts and values, and how understanding, analyzing, describing, and evaluating all require knowledge about values. The difficulty in such a theory is that what one values originates in the mind in often unobservable ways. The way that one approaches problems about the world – either as attempts at understanding the natural

⁹² Putnam, *supra* note 9 at pp. 30-31.

⁹³ Heather Douglas (2009). *Science, Policy, and the Value-Free Ideal*. Pittsburgh, University of Pittsburgh Press, pp. 108-112.

world or the social world – presupposes valuing. Knowledge about values thus becomes a starting point for any type of inquiry. Yet, the development of thought over the past few centuries has produced a restricted view about the possibility and practicality of value knowledge. As phenomena that are inherently subjective (as emanating from the mind), values pose serious problems when knowledge is metaphysically tied to knowing objective and observable natural phenomena. However, developments in the cognitive sciences and psychology present improved possibilities for overcoming such restrictions. Improved understanding of mental processes through scientific inquiry means that some previously unobservable phenomena may become capable of objective reflection through empirical evidence at some point in the future.

In addition to the problem concerning the unobservability of value, there is an interrelated problem that restricts the possibility of value knowledge. It is commonly stated that the study of values is about the prescriptive (normative) and that the study of facts is about the descriptive (analytical). This distinction is rooted in the idea that values are aimed at evaluation, while facts are aimed at description. However, it becomes readily apparent that there is a difference between value and evaluation. To say that some kind of entity is a value is to say that there is something that can be known about it. What makes most thinkers uncomfortable is that values do not contain the same types of properties attributable to facts, and therefore, there must be something fundamentally different about them. The point is that both values and facts (at least linguistically described) presuppose some kind of entity, property, or phenomena. Facts and values are nouns.

Describing (facts) or evaluating (values), on the other hand, are processes, not entities. They are verbs. Therefore, when speaking of values as being capable of evaluation, and facts as being capable of description, it is not clear exactly what is being claimed. The problem lies in the focus on observability: that is, a naturalized methodology capable of both describing and evaluating facts. Values (even if one concedes that they are entities), on the other hand, are often incapable of observability and are therefore are not amenable to either to a naturalized description or evaluation. This is, at its most essential level, the core debate between objectivity and subjectivity, and describes the main paradox in epistemology. If such a claim is true and there is no value capable of factual description (at least in terms of naturalized entities), how then is one to gain knowledge about values?

The answer to this question lies in the way that values are conceptualized, and how processes for evaluating can be objectively known. Once one can reject the idea that value understanding is only knowable if it meets the requirement of objectively observable phenomena, then the focus of inquiry can shift to understanding the ways that values can be known according to a subjective and nonnaturalized standard. However, regardless of whether values are

naturalized entities capable of observation or nonnaturalized entities created by operations of the mind, gaining knowledge about values in both scientific and social context requires an understanding of both decision and evaluation (including judgments). How one decides and judges is affected by a mixture of values and facts, and judgments cannot be made independent of the other. In jurisprudence, and especially in science, the possibility of a value-free ideal is attractive, but nonetheless unrealistic.⁹⁴ All modes of inquiry come ‘screaming with values’⁹⁵ and the pursuit of decision or judgment must be informed by values. A scientific judgment or a legal judgment cannot be made outside of the self who is making the judgment. As such, even if the judgment is being made about facts, the process of decisionmaking cannot be made outside the context of the observer’s mind.

This means that conscious and unconscious evaluative elements are always at work in determining the way in which one decides or judges. There is no way to avoid this. The alternative is to claim that knowledge in both the natural sciences and the social sciences can be achieved without values or the process of evaluation. In general, this is the project of positivist thought, and while it has clarified our conceptual factual knowledge about the natural world, it has acted as a thought-stopper in terms of value knowledge. A better science, or a better jurisprudence, is premised on the idea that improved understanding about the ways the mind values, decides, judges, and evaluates can only work to improve our knowledge of the natural and social world, not hinder it.

⁹⁴ *Id.*

⁹⁵ Putnam, *supra* note 9 at p. 103.

CHAPTER 3

LEGAL POSITIVISM AND LEGAL NONPOSITIVISM

1. INTRODUCTION

This Chapter will focus on jurisprudence generally, and how different approaches to legal inquiry affect the scope of value inquiry. The purpose of such inquiry is to clarify how knowledge about value can be grounded in theories about law. The scope of this inquiry will span from the local to the global, with the idea being that any realistic theory about law must have descriptive and evaluative force in understanding all entities that can be called law. This means that law, properly understood, will focus on entities that contain properties of legalness: from informal and localized standards of conduct, to municipal and state-centric legal systems, and to legal orders operating from without sovereign states (international or global law). This work challenges the views that the only law that can contain legality is that which emanates exclusively from within sovereign authority, and that a purely descriptive account of the law is possible without reference to the values that its users endorse.

At the same time, it is important to refrain from confusing that which can contain the properties of law from that which cannot. Social and moral norms of a society or community can constitute law; but just as importantly, they can frequently be distinguished from the law. The puzzle is attempting to figure out when the content of a particular phenomenon is morally binding and when it is legally binding. At the same time, values more broadly must be understood in the context of legal knowledge as entities with standalone legal properties (values), or as evaluative processes wrapped up and entangled with legal entities (evaluation).¹ The claim of this work is that the entanglement of law and value means that understanding the law requires an understanding of value and evaluation. All jurisprudential thought contains an element of evaluation – even analytical conceptions of the law. There is compelling evidence for understanding knowledge in general in this way. If true, this

¹ Values (noun) include phenomena such as principles of liberty, equality, and democracy; or cognitive values such as reasonableness, coherence, simplicity, clarity, and unity. The process of including value inquiry in the context of legal knowledge is through a process of evaluation not description. Evaluating (verb) requires an assessment of the worth of a legal rule in relation to its achievement of a particular value that is endorsed. Even knowing whether a legal rule obligates cannot always be described without evaluating the relative merit of the rule in the context of the population of individuals to which the legal rule is aimed. Even where a rule claims obligation in a descriptive manner that is empirically observable (e.g. a sovereign issues a legislative decree), it is based on an evaluation that there is a belief among those to which the legislative rule is aimed that they consider it as obligatory.

means that the idea of a pure analytical jurisprudence is a difficult concept to sustain.

Primarily, the main disagreement in legal theory lies in the amount and type of value integration that should be permitted in any 'real' theory about law. However, the point is that even if one is able to explain a pure positivist theory about law purged of moral evaluation (the relative goodness or badness of an entity), the theory will still be reliant on a certain level of value inquiry (including epistemic and cognitive values) in order to make the theory work. This is something that has been readily understood by philosophers outside the context of the law for a long time.² Analyzing requires evaluating, even if such evaluating is nonmoral and only occurs when evaluating what the scope of analysis should entail.³ For most legal positivists, the goal of legal inquiry is to reduce the elements of law into empirically verifiable terms. The aim is to determine when a law is legally valid, and that this can be achieved through purely descriptive analysis. However, at the other end of the spectrum could be called the political realists. For these theorists, law is only about values, specifically the value of power. The use of the law is merely a 'tool' for the powerful to pursue their self-interest. In between these extremes are a whole host of theoretical outlooks attempting to understand the limits of what can and should be considered to be law. It is the focus of this Chapter to understand these distinctions in the context of value knowledge.

This Chapter will begin by looking at jurisprudence in a very general fashion: that is, the key terminology for inquiring about law and how the different types and categories confuse and or enhance the way the law is understood. Many aspects of this Chapter will reflect similar distinctions that were made in the previous Chapter: such as the distinction between description and evaluation, the distinction between objectivity and subjectivity, and the distinction between analytical and normative inquiry. In the context of this Chapter, the distinctions between fact and value will turn to distinctions between law and value, and to the extent that values and evaluation (especially moral and ethical claims) can be separated from both the concept, content, and adjudication of the law.

² This is especially the case for the philosophic pragmatists and neopragmatists of the nineteenth and twentieth centuries.

³ The claim being made in this work is that even nonmoral values require an assessment of their relative worth (goodness), otherwise they would not be considered necessary. Evaluating the coherence of the law is not pursued because people believe it is bad. In this way, it is being claimed that both moral and nonmoral values are evaluated in terms of their relative goodness, and therefore there is nothing structurally that should allow moral values to be excluded from descriptive accounts of the law, but allow for cognitive and epistemic values to be incorporated.

2. JURISPRUDENCE IN GENERAL

Jurisprudence is a wide topic. It covers all the collective knowledge available about what it is that is called law and how decisions about the law are made. As a means for regulating social behavior, both good and bad behavior, law has persisted in some form for as long as human beings have been organized socially and politically. Since law is wrapped up in our ideas about how human interaction should be organized in the context of social and political processes, it is very difficult to find the proper balance for understanding what is legal, what is social, and what is political. To further complicate matters, law – as a means of guiding social behavior – is encased with many normative (evaluative) elements about how individuals ought to behave in a social environment. This complication often invokes moral and ethical claims. In many cases, the law makes moral claims. However, at the same time, the law can be unjust and immoral. How is this possible? The answer lies in the way that law is conceptualized and what essential properties the law contains, and what properties are merely contingent. This section will look at these broad categories of legal thought and how jurisprudence attempts to differentiate these difficult – and seemingly intractable – problems between the political-social and the legal (at the societal level), and the moral-ethical and the legal (at the individual level).

2.1 The Concept of Law and the Content of Law

In the context of legal understanding – and value understanding as well, the first major distinction that must be analyzed is the difference between the concept of law and the content of law. Like much of the previous Chapter, and its focus on epistemology more broadly, the philosophic limitations that are placed on what is capable of knowledge and what is not – or only skeptically so – has a major influence on the breadth of inquiry. If, for example, one takes the scope of possible knowledge to only encompass analytical (relation of ideas) and synthetical (matters of fact) knowledge,⁴ then the way that one comes to know the concept of law will likewise be restricted. This can be a problem for the legal positivists, and it was a problem for the logical positivists.

For the legal positivist, the concept of law must be capable of describing what the law is – and what it is not. It is claimed that the identification of legality can be determined without evaluation (especially moral evaluation). Law is a concept that is based on entities that are empirically verifiable and hence considered objective. For the legal nonpositivists, and especially those of the natural law frame, the description of what is the law also turns on an element

⁴ See Chapter 2, Section 2.

of value rationality or reasonableness that requires some degree of evaluation in determining legality. Most nonpositivists hold that the concept of law is something that can be rationally justified (even if it is not empirically verifiable in the scientific or positivistic sense).

For both positivists and nonpositivists, the concept of law is about what makes law law, while the content of law concerns the substantive rules, principles, and norms that are contained within the concept. The concept of law can be analogized as the properties of an empty box; and what is contained within that box is legal content (as opposed to social or political or ethical content). The focus for the conceptual legal theorist then is to figure out what are the essential properties of this legality 'box.' As stated, for the legal positivist, the range of inquiry is limited to that which is empirically verifiable, and that verification is primarily aimed at describing authority and obligation. A law is a law if it is legally valid; and a legally valid law is one that is verifiably knowable as claiming authority and obligation objectively. This is called the pedigree thesis or the sources thesis, and it is the central requirement in a positivist concept about what the law is. For the positivist, especially HLA Hart, the pedigree thesis forms the primary component of what is required by the term law.⁵

However, there is a particular problem with conceptualizing law in this way. The authoritative and obligatory nature of law properly so called is primarily a normative claim (although arguably not necessarily a moral or ethical claim), and as such, is not always empirically verifiable. From an epistemological perspective, this limitation is similar to the problems of the logical positivists in restricting knowledge only to empirically verifiable phenomena, while not realizing that the criteria established for such a concept about knowledge was not itself empirically verifiable.⁶ Under such a concept of law, the question of when a law is a legal norm and when it is merely a social or moral norm is predicated on the idea of a basic norm⁷ or some rule of recognition⁸ that validates a social norm as a law. This basic norm or rule of recognition possesses no content, but constitutes the essential properties of the legal concept 'box' mentioned above. However, such a nonreductivist basic norm is assumed. It cannot be described objectively as a scientific fact.

⁵ For Hart, the pedigree thesis holds that the existence of a legal system requires "[o]n the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials." HLA Hart [1961](1997). *The Concept of Law*, edited by Joseph Raz. Oxford, Clarendon Press, p. 113.

⁶ See Chapter 2, Section 3.4.

⁷ This is the grundnorm in Kelsen's pure theory of law. See Hans Kelsen [1960](2009). *Pure Theory of Law*, translated by Max Knight. New Jersey, Law Book Exchange.

⁸ Hart, *supra* note 5 at p. 90.

While this is an attractive way to conceptualize the concept of the law, it presents a significant problem for determining when such criteria are met. Authority and obligation are value claims, and while occasionally observable and objectifiable, they are often only knowable as unobservable and internalized processes of the mind. Furthermore, it can be claimed that the identification of authority and obligation is not descriptive, but evaluative; and therefore requires value knowledge: a claim that positivists reject (at least so far as the description of the concept of law is concerned). However, for some positivists, this problem can be solved by claiming that only epistemic or cognitive values are needed for understanding authority and obligation, and that no moral or ethical recourse is ever required for determining legal validity.⁹

While the way that the law is conceptualized shows differences between legal positivism and legal nonpositivism, the scope of legal content is likewise distinguishable between these theoretical frames. Some conceptual positivists do not place limits on what can be contained in the legally valid 'box.'¹⁰ However, contemporary legal positivists, especially those following in the Hartian tradition, believe that there should also be limits to the content of law. For positivists such as Hart, the content of the law is limited to what are called social facts.¹¹ For the positivist, social facts do not need to be evaluated in terms of rightness or wrongness. Once they have been posited in legally valid form, they are law. While not all values and norms present as empirically observable behavior, many do, and they are supposed to reflect the standards of acceptable behavior within a particular legal community.

The basic claim about social facts is that they mimic the way that the behaviorist turn in psychology focused on actual behavior in describing psychological phenomena. Both in psychology and sociology, the focus on behavior and the ability of behavior to be objectively verified as empirically observable phenomena made it a popular approach to psychological and sociological knowledge for most of the twentieth century. However, the cognitive turn in psychology has identified many of the limitations of the behaviorists.¹² What they have learned is that there is a large amount of knowledge that is unobservable, subconscious, and not amenable to direct empirical verification. In other words, there is legal content beyond what Hart considered to be a social fact.

⁹ See Brian Leiter (2003). *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*. American Journal of Jurisprudence. Vol. 48, pp. 17, 34.

¹⁰ This is Hans Kelsen's position.

¹¹ Social facts are those conventions, beliefs, values, norms, customs, and habits that are actually practiced. They are empirically observable as actual behaviors. They are not unobservable processes derived from rational thought alone.

¹² The so-called cognitive revolution is traceable to Noam Chomsky's review of a book by a prominent mid-twentieth century behaviorist. Noam Chomsky (1959). *Review of Verbal Behavior by BF Skinner*. Language. Vol. 35, p. 26.

One of the main purposes of this work is to provide empirical evidence about typically unobservable phenomena that exist only as cognitive processes. If these phenomena can be made observable, then they may be able to meet the criteria of a social fact. For the nonpositivist, many of these unobservable mental processes such as rationality and reasonableness can be included as sources of legality. The problem in such a conceptualization of legality is in its ability to be verified. Without a means for objectively verifying these ‘natural’ laws, positivists will always hold that such a conceptualization of law will allow its proponents to manipulate what is the law through subjective preferences, desires, and interests. In other words, it deflates the possibility for a Rule of Law.¹³ For most positivists, the notion that law properly so called can ever be identified by the mind alone a priori is ‘nonsense upon stilts.’¹⁴

From a nonpositivist perspective, however, such an idea is not nonsense. The difference lies in the scope of knowledge that is permitted in legal inquiry. The moral rationalists and natural law school have long argued that there are properties that can bind action from the internal perspective alone: that is, a sense of obligation can be derived from rational thought alone. This is essentially the Kantian view, and while most philosophers suggest that a concept of cognition such as this is metaphysically untenable (at least the a priori part), they continue to endorse the idea that there is knowledge that can be gained about both law and morality that is not derived from observable phenomena.¹⁵ For the purposes of this work, it is these seemingly internal, unobservable, subjective, and cognitive processes of the mind that are the focus. The goal is to provide new methods for uncovering and observing these phenomena in a manner that meets the objective mandate of positivist (scientific) reflection.¹⁶

2.2 Theories About Law and Theories About Decision

The distinction between concept and content is important in understanding the stance of the positivist and nonpositivist frames in jurisprudence, but from a practical perspective, the distinction between law and decision is of equal

¹³ The Rule of Law in capital letters refers to a broad concept about the function of legal systems and their ability to constrain the behavior of even the most powerful actors. The maxim, ‘no one is above the law’ is attributable to such a concept.

¹⁴ Jeremy Bentham (1792). ‘Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution,’ republished in John Bowring (1843). *The Works of Jeremy Bentham, Volume II*. Edinburgh, William Tait.

¹⁵ See Chapter 2, Section 3.2.

¹⁶ It is proposed that Q methodology can assist in providing empirically verifiable evidence about values in the context of legal thought. And if new methodologies can assist in discovering these internal and subjective aspects of rational thought in an empirically observable manner, then they can become observable social facts. The important claim here is that making unobservable phenomena observable can add to our understanding of what the law *is*, not just what it *ought* to be (which it might be helpful in assisting with as well).

import. The practice of law is about making decisions. These are the decisions that lawmakers make when enacting and drafting laws, the decisions that lawappliers make when applying and interpreting the law in the adjudication of disputes, and the decisions that lawshapers make when influencing the law through scholarly discourse and commentary. At all of these levels, decision is central. Admittedly, however, the philosophic project of the positivists is not focused on such inquiry; rather, it is focused on the sources and properties of a legal entity. However, by limiting the scope of inquiry to the concept of law, knowledge about both content and decision remain under analyzed. In many ways, this makes sense. Discussions about content and decision are mired in value considerations – even moral ones: a focus that conceptual positivists seek to limit.

In attempting to theorize about possible ways to improve value knowledge in the context of legal knowledge, it is then important that law is looked at holistically in terms of concept, content, and decision. Only with such a delineation of inquiry is a realistic jurisprudence possible. In the context of theories about law, decision is most commonly tied to theories about adjudication. Adjudication is about judging and interpreting; and as such, it is not a descriptive or analytical task but an evaluative one. In this frame of reference, decision is how decisionmakers such as judges or arbitrators apply and interpret the law according to the specific circumstances of a dispute. The focus of this type of inquiry usually centers on the amount of discretion the decisionmaker has in adjudicating the cases before him or her; and this is where the discourse on the objectivity and subjectivity of the law often becomes relevant.

In the context of decision, and especially in the context of adjudication, the idea of legal subjectivity refers directly to how decisionmakers decide and judge. Invariably, legal decision is about judgment and interpretation, and both of these processes contain normative and evaluative elements. This presents a considerable problem for legal positivists (especially in practice). As such, theories about adjudication frequently attributed to those of the positivist bent would be called those of legal formalism. The attempt here is to strip away as much discretion (subjectivity as a negative concept) about judging and interpreting from the decisionmaker as possible. Formalism requires the mechanistic application of the law to the facts in a particular case. However, as a social phenomenon, the law is never amenable to such rigid analytics; and frequently, the vagueness, indeterminacy, or silence of the law to a particular case will leave the formalist judge with nothing to apply. At the other extreme, and often closely associated with nonpositivist conceptions about the law, are those lawadjudicators sympathetic to the theory of legal realism in its various incarnations. Here, the vagueness, indeterminacy, or silence of the law often presents the lawapplier with the discretion to decide

cases in nonlegal terms (or in value terms, such as according to legal principles).¹⁷

Arguably, however, both formalism and realism are not ideal theoretical orientations. Formalism mandates too little value inquiry and legal realism mandates too much.¹⁸ In terms of theories about adjudication, there are two possible alternatives to legal formalism and legal realism. They derive from the interpretivism of Ronald Dworkin¹⁹ and the policy-orientated jurisprudence of Harold Lasswell, Myres McDougal, and Michael Reisman.²⁰ Both of these theories will be highlighted in detail at later points in this work, but for now, it is only important to distinguish these middle paths from other theoretical positions on decision. In terms of gaining knowledge about value, these two theories are the primary frames of reference for postulating a comprehensive and realistic understanding of the role of value and evaluation in the context of jurisprudential thought. As such, they will form the jurisprudential basis for understanding the theory of configurative fairness that will be proposed as a means for gaining knowledge about value in the context of law. Both the Dworkin and Lasswell-McDougal-Reisman approaches to decision focus on the role of value (sometimes moral) knowledge in determining both what the law is and what the law should be in the context of decision.

2.3 Legal Decision and Legal Discourse

One of the major benefits in separating theories about law from theories about decision is that it permits the reflection on a further distinction: between legal decision and legal discourse. Legal decision refers to lawmaking and lawapplying, while legal discourse refers to lawshaping and lawinfluencing. These projects are obviously distinct, and yet, they are often discussed interchangeably. The problem that arises from such confusion is the potential for weakening theories about decision in the context of legal understanding. While scholarly work, such as this work, is aimed at enlightenment about decision, it is not decision. To say that the discourse about legal decision is synonymous with legal decision is both problematic and distorting. Legal decision – the actual work of lawmakers and lawappliers – is distinct from the way that law is thought about from the outside. This is not to say that lawshaping and lawinfluencing discourse does not affect decisionmaking; otherwise, legal discourse would only be an exercise in scholarly

¹⁷ It is claimed by some theorists, especially Dworkin, that the identification of legal principles requires moral reflection.

¹⁸ A criticism of legal realism is that it allows for the judicial decisionmaker to subjectively (in the negative sense) decide cases according to his or her own preferences and interests.

¹⁹ Ronald Dworkin (1986). *Law's Empire*. Cambridge, Belknap Press.

²⁰ Harold Lasswell & Myres McDougal (1992). *Jurisprudence for a Free Society: Studies in Law, Science, and Policy. Volume I and II*. New Haven, New Haven Press; Michael Reisman (1999). *Theory About Law: Jurisprudence for a Free Society*. Yale Law Journal. Vol. 108, p. 935.

understanding. In fact, the way that one thinks about, talks about, and writes about the law is often very influential in the way the decisionmakers respond to legal problems. However, they are distinct jobs.

One of the key distinctions in this regard refers to the job or mandate of the decisionmaker and the scholar. What a legal decisionmaker decides reflects their capacity to render legal decisions that are legally binding on its subjects. Legal discourses do not have such power. The power of the legal discourses is different. It focuses on the ability of the scholar or subject of the law to influence and shape the law through writing, thinking, and talking about the law. To help clarify these differences, think about the arbitrator or judge applying the law in a particular dispute, and then think about the academic or scholar commenting on the outcome of that dispute. The arbitrator or judge is tasked with the context of the dispute and must apply and interpret the law in accordance with the law as it is.²¹ This job may be very different from the work of the scholar or academic who is commenting on the decision of the decisionmaker and evaluating its merit according to the outcome as it is, but also according to how the outcome could have been (or should have been).

For the purposes of this work, the distinction between legal decision and legal discourse is relevant to clarifying value inquiry in the context of the law. Legal decision and legal discourse can be seen as distinguishing between an insider's (internal) and outsider's (external) perspective. If the discourse on a particular topic demands that decisions be taken in a certain way, it can only influence actual decisions from the outside. Such discourse has no bearing directly (though it does often indirectly) on the minds of the decisionmaker working on the inside. This means that the way that a decisionmaker incorporates values in making determinations about the law is an exercise in using values to evaluate the law from an insider's perspective (that is, from the decisionmaker's perspective). On the other hand, the way that the discourses incorporate values in understanding the merits and outcomes of the decision is an exercise in using values to evaluate the law from an outsider's perspective (that is, from the discourses's perspective). The importance of this distinction lies in the observational standpoint²² of the observer and will become more relevant when discussing the idea of configurative fairness in subsequent Chapters.

²¹ See generally Michael Reisman (2011). *Soft Law and Law Jobs*. Journal of Dispute Settlement. Vol. 1, p. 25.

²² This is a major aspect of the policy-orientated jurisprudence. See Lasswell & McDougal, *supra* note 20 at p. 22.

2.4 Theories About Law and Theories About Justice

Another distinction that persists in jurisprudential thought is that of theories about law as distinct from theories about justice. This distinction is so persuasive that discussion about law and discussions about justice rarely cohabitate as theoretical approaches to legal understanding. While this is not true in all cases, justice as a concept does have important characteristics that distinguish it from conceptual understandings of the law. Jurisprudentially speaking, conceptions about law are about what the law is (the *lex lata* – that is, what determines a legally valid rule) and conceptions about justice are about what the law ought to be (the *lex ferenda* – that is, how should a society or politic conceive of the good and the right in order to best foster human flourishing). In this way, there is a stark distinction – conceptually – between the two. Theories about the concept of law are said to be descriptive and in the analytic tradition of philosophy, while theories about the concept of justice are said to be normative and in the ethical and political tradition of philosophy.

Theories about justice are primarily normative and evaluative in orientation. They seek to explain what principles of justice a society should embrace in pursuit of the good or the right. There are essentially two ways to approach theories about justice in contemporary thought. One comes from the Aristotelian tradition and the other from the Kantian tradition. Theories about justice of the Aristotelian variety seek to begin with an idea about excellence; and from there it attempts to explain how a political community (or legal community) can contribute to the achievement of excellent and worthwhile lives.²³ Modern philosophic thought might describe such an approach as making the good presuppose the right.²⁴ It is a claim that an account of justice (the right) must be derived from a deeper account of what counts as a good or excellent way to live (the good). The Kantian approach, on the other hand, holds the opposite to be true. Kant would state that what is just is objectively determinable as categorical imperatives. These principles of justice are determinable through reason alone. Once these principles of justice are determined, they can guide action in terms of what a good life entails. Kant “therefore seeks to make ‘the right’ prior to ‘the good.’”²⁵ While the Aristotelian conception of justice remains a valid starting point for contemporary natural law theorists – most notably John Finnis, it is far less popular than those theories about justice that derive from the Kantian tradition.

For contemporary justice theorists, most notably John Rawls, the Kantian approach permits theorists to seek principles of justice, while at the same time allowing for no need to demand a particular vision of what constitutes the

²³ Nigel Simmonds (2008). *Central Issues in Jurisprudence, Third Edition*. London, Sweet & Maxwell, p. 10.

²⁴ *Id.*

²⁵ *Id.*

good life.²⁶ In contemporary society, this idea has been the hallmark of liberalism; and has spawned the most robust theories about justice in the last hundred years. Rawls theory is aimed at the particular problem of how a modern pluralistic and democratic society can choose a political conception of justice that would serve as the basic structure of that society.²⁷ In doing so, his approach seeks to determine what principles of justice are essential for ordering a liberal society whose citizens configure their value preferences differently.²⁸ In this way, the Rawlsian approach does not propose a theory that calls for a particular conception of the good to be pursued. Rather, he sought to establish the constitutive process by which rational beings could agree on a framework of rights, laws, and principles by which to be governed. This entails what Rawls calls a ‘thin theory of the good.’²⁹ It provides basic principles of justice that all right thinking human beings would acknowledge as true.³⁰ Once these basic principles are established, citizens of a particular society can then determine what value configuration they would agree to live by.³¹

While the liberalism of Rawls theory closely parallels Kantian political philosophy, it also has parallels with his treatise on practical reason. As stated in the previous Chapter, Kantian ethical theory held that knowledge about values (especially ethical ones) could be determined by the mind alone through rational processes. He also believed that all rational minds have the capacity to come to the same conclusions from these determinations. That is, ethical knowledge is capable of objectivity. Rawls, however, does not go so far. In this way, the Rawlsian theory of justice is both objective and subjective. It is subjective in the sense that moral discourse is internal to the self and that the plurality of what can be considered valuable to individuals means that there is no unitary concept of the good life: it will vary from community to community.

²⁶ This position is not Kantian, but a neo-Kantian formulation of the idea that reason can determine what is the right thing to do. However, in the context of postmodern and liberal thought, this approach to value knowledge has permitted theorists such as John Rawls to account for justice in a manner that is sensitive to context, plurality, and individual differences.

²⁷ John Rawls & Erin Kelly (2001). *Justice as Fairness: A Restatement*. Cambridge, Harvard University Press, p. 9.

²⁸ An example of this might be the difference between the atheist and the Catholic living in the same liberal society. The question Rawls is seeking to answer is whether there is a set of core underlying values (he calls principles of justice) that would permit distinct perspectives to cohabitate peacefully and stably over time.

²⁹ John Rawls (1971). *A Theory of Justice*. Cambridge, Harvard University Press, p. 348.

³⁰ The thin theory of the good requires that individuals agree that an objective set of core principles of justice exist.

³¹ This is similar to some other positions in political philosophy. Most notably, David Gauthier. His seminal work, *Morals by Agreement*, holds a very similar position to that of a theory of configurative fairness. Essentially, this positions holds that despite knowing the metaphysical truth about morality, societies can configure moral norms rationally according to the choices that individuals would make under a set rational conditions. Rational thought processes allow individuals to agree to the moral configuration that they would choose to live by. This contractarian consensus that forms is similar to the concept of shared value subjectivities. See David Gauthier (1986). *Morals by Agreement*. Oxford, OUP.

However, it is objective in the sense that the rational mind is capable of objective knowledge about what conception of justice individuals living in a liberal society would endorse. This way of conceptualizing justice means that – so long as there is a process for making these mental processes of rational thought amenable to empirical observation – there is the possibility of objectively knowing what values a particular society would choose to live by.

The translation of the Rawlsian approach to justice (or any justice theory for that matter) into the jurisprudential context can be a challenge. For some, it is unclear how theories about justice and theories about law could ever overlap. The possibility for such interaction is of course complex, but some clarity can be gained if the conception of what the law is requires that it is just. If objective knowledge about value is possible, then conceptualizing the law as claiming justness could be evaluated in the same way as conceptualizing the law as claiming authority.³² The challenge lies in determining how to describe the justness or fairness of a particular law or legal order. Advancing knowledge about the objective description of justice as based on the shared subjective understanding of value across individuals could assist in bridging the divide between justice theory and legal theory. The goal of this work is to advance empirical knowledge about value configurations in particular legal orders in a way that can describe fairness. If a theory of configurative fairness is possible through the employ of Q methodology, then it may be possible to generate more overlap between conceptual theories about justice and conceptual theories about law.³³

3. LEGAL POSITIVISM AND LEGAL NONPOSITIVISM

Now that some of the different types of inquiry in general jurisprudence have been given, one can turn to some of the particular distinctions between positivist and nonpositivist frames of reference. The kinds of inquiry that are the focus of positivist thought in jurisprudence are limited primarily to conceptual understandings of the law. In this way, it has been said that “no legal philosopher can be only a legal positivist.”³⁴ What this claim is making is that even if one can contemplate a sound theory about the nature of the law, one must still be able to explain how decisions about the content of the law

³² Both justness and authoritativeness are normative value claims and yet one is claimed to be descriptively possible (authority), while the other is not.

³³ It is important to note, however, that a theory of configurative fairness is not a metatheory that claims about what is universally just. Rather, it is an application specific to particular contexts. It is a theory that can assist in determining what a particular legal community considers to be fair. There are thousands and thousands of such communities. A fair configuration of value as it pertains to particular legal orders will differ among such communities.

³⁴ Leslie Green (2003). *Legal Positivism*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/entries/legal-positivism> (last accessed 1 September 2013).

are made, and how the law is to be applied and interpreted.³⁵ These processes cannot be determined and understood by a conceptual understanding of the law completely separate from the social context in which the law operates. To fully understand the law then, one must be able to explain how the law, once conceptually understood, operates in practice as a means of ordering social interaction (an idea based in philosophic pragmatism).

With that said, there are a number of different ways that legal positivists approach their conceptual model of the law. The most important of these distinctions is between exclusive (hard) and inclusive (soft) positivists. The exclusive positivists, such as Joseph Raz, holds that the concept of law as claiming authority requires the exclusion of moral justification in order to be law.³⁶ The inclusive positivists, such as Jules Coleman, on the other hand, look to determine what the law is by incorporating a methodology for what types of facts can constitute the law. Hart calls these social facts and they are limited to observable phenomena of social interaction. The incorporation of social facts in Hart's positivist understanding of law qualifies his theory as that of soft or inclusive positivism because it is a claim that law's authority can be inclusive of moral justification if such a justification is observable as a social fact through actual practice. In one part of his book, *The Concept of Law*,³⁷ he calls his project for understanding the law as a 'descriptive sociology'.³⁸

Those who view their orientation as opposed in part or in whole from those of the legal positivists are labeled in this work as nonpositivists. In some ways this is a misnomer because in the same way that no legal philosopher can be only a legal positivist, no nonpositivist can deny that the claims of the legal positivists *do* constitute law in many cases. The primary criticism of legal positivism that is held by nonpositivists is that their restriction of what counts as law is so limited as to render a full understanding of the law and its role in larger social processes incomprehensible. Conceptually speaking, the greatest challenge to the positivist thesis is that of the natural law school. Natural law theories about the law hold that the content of law is determinable by *both* sheer social fact and as a set of reasons for action. Nonpositivist theories of this type therefore claim that there are cognitive processes that can constitute

³⁵ "A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all." Id.

³⁶ See Joseph Raz (1985). *Authority and Justification*. Philosophy & Public Affairs. Vol. 14, p. 3.

³⁷ Hart, *supra* note 5.

³⁸ In this way, his concept of law incorporates many of the ideas of the sociological positivists, such as Emile Durkheim, who sought to remove as many of the unobservable mystical and consciousness-based elements from their understanding of social processes. See Emile Durkheim [1895](1982). *The Rules of Sociological Method*, translated by WD Halls. New York, Free Press.

valid reasons for action that are explicitly excluded from positivism. It is this claim about rationality and reasonableness that provides the greatest opportunity for gaining value knowledge in the context of legal understanding because it contemplates that such knowledge is theoretically possible (although, often difficult to measure or understand).

Another theory of the nonpositivist frame includes the interpretivism about law of Ronald Dworkin, which seeks to mark a middle path between the positivists and the natural law schools. Likewise, there are a number of theories about decision and adjudication that fall under the nonpositivist umbrella, and can be seen to include any theory that claims the law must be understood as a process of justifying reasons for action. This then would include the frame of the legal realists and those configurative theories such as the policy-orientated jurisprudence of Harold Lasswell, Myres McDougal, and Michael Reisman. While both the interpretivism and configurativism frames focus on theories about decision and adjudication, they are in fact claiming much more: they state that the very nature of the law must be understood in such a context. That is, unlike the natural law school that seeks to include the element of reasonableness (rational processes of the mind) to what can constitute a law, the process-based theories hold that the law – in terms of both content and concept – can only be understood realistically as part of an understanding about how decisions are made in the context of social and political processes.

3.1 Legal Positivism

At its core, the positivist thesis holds that the content and concept about law must be limited to that which is, in some sense, naturalizable. That is, knowledge about the law must be limited to that which is observably knowable. No matter what ilk of positivist one claims to be, the methodology used for identifying and describing the law must be objective. This is not a claim that knowledge about the law exists as a mind-independent entity, but that knowledge about the law must be identifiable in terms of observable facts and social behavior that can be understood by all those subjects to which the law is directed. The positivist also holds that there must be an objective means of determining legal validity (the pedigree thesis) and that there is no *necessary* connection between law and morality (the separability thesis).

3.1.1 A Brief History of Legal Positivism

This section will look at mapping some of the major thinkers that have developed the positivist project over the past centuries, and how it has evolved over time. The primary thinkers of the twentieth century in this regard are

HLA Hart and Hans Kelsen. While their views on the nature of the law remain a constant source of discourse about positivist thought, their ideas have been advanced and commented on by many important contemporary thinkers such as Joseph Raz,³⁹ Jules Coleman,⁴⁰ Brian Leiter,⁴¹ Matthew Kramer,⁴² and Scott Shapiro,⁴³ among others. While most of contemporary thought about legal positivism focuses on refining the concepts of law in the context of postmodern societies, its historic roots are closely linked to the concept of sovereignty and the problem in political philosophy relating to the legitimate authority of government.

The political philosophy of Thomas Hobbes and Jean Bodin⁴⁴ in the fourteenth and fifteenth centuries provides a conceptual foundation for the concept of sovereignty and its relation to the positing of legal rules. For Hobbes in particular, sovereignty is rooted in the idea of a social contract,⁴⁵ and that without such a concept of sovereign authority, individuals would exist in a state of nature that leaves the life of individuals as “nasty, brutish, and short.”⁴⁶ By conceding some of one’s freedoms and liberty to a sovereign, the sovereign would then be able to provide stability and order to that society within its territorial borders. The claim made by Hobbes was essentially that whatever freedoms that an individual gave up in order to be bound by the will and authority of a sovereign was necessary for removing individuals from a state of nature: an idea equivalent to social chaos and anarchy.⁴⁷

It is from this conceptualization of sovereignty that new ideas about the scope of legal inquiry developed. The question in legal philosophy then became what is law in the context of sovereignty; and the answer became: that which is posited by a sovereign. From there, the conversation turned to an understanding to what ethical and moral structure was the sovereign to be constrained by, if at all. For some legal positivists, the authority of the sovereign was sufficient for conceptualizing an understanding of what the law is. Under this view, once sovereign authority was identified, that which the sovereign stipulated as law was law. Describing and identifying the law was based on sovereign decree. However, if sovereign authority dictated a duty to obey as based on a social contract, when could that sovereign authority ever

³⁹ Joseph Raz (2009). *The Authority of Law, Second Edition*. Oxford, OUP.

⁴⁰ Jules Coleman (2003). *The Practice of Principle*. Oxford, OUP.

⁴¹ Brian Leiter (2007). *Naturalizing Jurisprudence*. Oxford, OUP.

⁴² Matthew Kramer (2007). *Objectivity and the Rule of Law*. Cambridge, CUP.

⁴³ Scott Shapiro (2011). *Legality*. Cambridge, Harvard University Press.

⁴⁴ Bodin defined sovereignty as indivisible authority that is both absolute and perpetual. Hobbes, borrowing from Bodin, conceptualized sovereignty as the idea of an entity that constitutes absolute authority within a territory to which all of its subjects must obey.

⁴⁵ Sharon Lloyd & Susanne Sreedhar (2011). *Hobbes’s Moral and Political Philosophy*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/archives/spr2011/entries/hobbes-moral> (last accessed 1 September 2013).

⁴⁶ Thomas Hobbes [1651](2008). *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*. Oxford, OUP, Section XIII(9).

⁴⁷ Lloyd & Sreedhar, *supra* note 45.

be disobeyed? Would a tyrannical sovereign be owed the same duty to obey as would a benevolent one? Historically, these are questions that are not dealt with by conceptual positivists; rather, they are the questions of moral and political philosophy.⁴⁸

If this is true, and the identification of what the law is can be disjointed from the requirements of morality, then how would the law of a sovereign ever be morally unjustified? The claim from a positivist perspective is that there is good reason to disobey morally unjust laws, not because they cease to be law, but because they have lost their moral authority (but arguably not their legal authority). This line of argumentation is in sharp distinction from some natural law theories which hold that the conceptual nature of the law requires that the law be both authoritative and just (as a requirement of reasonableness). Under such a view, an unjust law is not a law at all.

The modern articulation of legal positivism derives, not from the Hobbesian social contract, but from the great utilitarian philosopher, Jeremy Bentham,⁴⁹ and his disciple John Austin.⁵⁰ For them, legal positivism was a conceptual theory about descriptive jurisprudence based on sovereign authority. A law posited by a sovereign must be obeyed because it is backed by sanction. John Austin famously proposed a model of descriptive jurisprudence as based on a command theory of obedience.⁵¹ A command, according to Austin, is an expression requiring a human being to conform his actions or behavior out of a habitual sense of obligation to another human being; and that this obedience to act or behave in a certain way is generated by a stated or implied threat of sanction for noncompliance.⁵² For Austin, the law is that which performs the task of ordering human behavior via a posited sovereign command that is backed up by the coercive power of that sovereign. However, Hart believed that this account was inadequate for the reason that there are laws that can be authoritative and generate a sense of obedience despite the fact that they are not coercive or backed up by threat of a sanction.⁵³

⁴⁸ However, it is from this idea that the separability thesis emerges. Such a thesis claims that there is nothing conceptually that requires the laws of a sovereign to be morally meretricious. The requirements of law and morality are separate enterprises – and are not to be conflated.

⁴⁹ Jeremy Bentham [1782](1970). *Of Laws in General*, edited by HLA Hart. London, Athlone Press.

⁵⁰ John Austin [1832](1995). *The Province of Jurisprudence Determined*, edited by WE Rumble. Cambridge, CUP.

⁵¹ Simmonds, *supra* note 23 at pp. 152-53.

⁵² Austin, *supra* note 50 at p. 166.

⁵³ According to Hart, Austin's "notion of a habit of obedience is a mere regularity of conduct, not a rule." See Simmonds, *supra* note 23 at p. 152.

3.1.2 HLA Hart and Hans Kelsen

In the mid-twentieth century, Hart proposed that the concept of law as articulated by Austin was too reductivist and sanction-focused,⁵⁴ and embarked on a project to reconceptualize descriptive jurisprudence. His conceptual theory about law has been the benchmark for positivist thought for much of the twentieth century, and it continues to exert significant influence. Hart's theory both provides a modification of the Austinian sovereign command theory, while at the same time clarifying the description of legality and legal validity as that which is not necessarily contingent on moral evaluation. Hart provides a conceptual positivistic account of the law that focuses on the identification of legal authority as rooted in social rules that are actually practiced and empirically observable. A legally valid rule is one that conforms to the criteria of power-conferring secondary rules, which create a sense of obligation because it has been accepted from an official's internal point of view.⁵⁵

However, for the uninitiated, the philosophical efforts of Hart are often paired with the thinking of another influential legal positivist of the same period: Hans Kelsen. While much of their respective conceptual approaches are distinct, there are also many similarities. Both Hart and Kelsen sought to establish a firm conceptual framework for understanding the law from a positivistic, but nonreductive perspective. They also claimed that the duty to obey, and the identification of a legally valid norm or rule, did not need to presuppose any level of moral evaluation.⁵⁶ The basis for both the Hartian and Kelsenian form of legal positivism then turns on how authority of the law is conceptualized and more importantly, how individuals become obligated to obey the law.

However, while Kelsen's pure theory of law⁵⁷ aims at describing law in purely analytical terms (in the same way as Hart), he maintains (contra to Hart) that the function of the law is to prescribe the official application of sanctions.⁵⁸ Kelsen's understanding of the law is based on a hierarchical categorization of

⁵⁴ Hart believed that legal authority and obligation could not be reduced to simple elements of habit and obedience. He also held that the mere fact that a sanction is threatened is not sufficient to claim that an obligation to conform one's behavior to it is required. See Stephen Perry (2006). *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*. Fordham Law Review. Vol. 75, pp. 1171, 1178.

⁵⁵ Officials believe that a particular rule is binding because it is a regularly practiced social rule. It is "this regularity of behavior towards which officials take 'the internal point of view:' they use it as a standard for guiding and evaluating their own and others' behavior, and this use is displayed in their conduct and speech, including the resort to various forms of social pressure to support the rule and the ready application of normative terms such as 'duty' and 'obligation' when invoking it." Green, *supra* note 34.

⁵⁶ This is the separability thesis and it holds that the identification of a legally binding rule can bind its subjects without evaluating the moral merit of its content.

⁵⁷ Kelsen, *supra* note 7.

⁵⁸ This focus on sanctions and the authority of the state to prescribe law is aligned with the Austinian conception of the law.

legal norms, all of which prescribe how one ought to act. The highest of these legal norms is the basic norm or *grundnorm*, which is presupposed.⁵⁹ The idea claims that a legal rule is one that is legally valid; and that its validity is derived from a foundational or basic norm upon which all other legally valid norms rest. It is this constitutive norm that distinguishes law from nonlaw; and the validity of any legal system rests on the effectiveness of the basic norm.

For Kelsen, the basic norm is valid because it is generally followed, and that people follow it because they believe it is valid.⁶⁰ Kelsen holds that a valid law is one that ought to be obeyed. The prescribing function of a law as obligating its subjects is based on this basic norm. While Kelsen believes that this basic norm exists in the ‘juristic consciousness,’ it is ultimately an assumption that is required in order for a legal system to be understood. The validity of the “basic norm rests, not on another norm or rule of law, but is assumed – for the purposes of purity. It is therefore a hypothesis, a wholly formal construct.”⁶¹ From a philosophical perspective, Kelsen’s project is intriguing; however, it is difficult to understand how all of this work can be done without recourse to any type of evaluative judgment. It seems that the validity of the basic norm is premised on a leap of faith: it bases his entire descriptive account of the law on a norm that is not empirically verifiable.⁶²

For Hart, the validity of the law also rests on a constitutive concept: the rule of recognition. This is what he calls a secondary rule, and it from these secondary rules that the validity of primary rules flow.⁶³ However, Hart’s theory about the concept of law holds a number of features that avoid some of the perceived problems with Kelsen’s approach. Hart rejects the assumption that a valid rule is determined by a sense of obligation backed by some kind of sanction. Rather, the validity of a legal rule is premised, not on a (subjective) judgment that the rule ought to be obeyed, but by the fact (objectively determinable?) that a valid rule “satisfies all the criteria provided by the rule of recognition.”⁶⁴ Hart claims that the identification of a legal rule as meeting the

⁵⁹ Green, *supra* note 34.

⁶⁰ While this may appear a circular argument, the validity of the law comes from a sense of being obligated by it.

⁶¹ Raymond Wacks (2006). *The Philosophy of Law*. Oxford, OUP, p. 35.

⁶² The existence of this basic norm is premised on a metaphysical account of Kantian rationality. Whether this metaphysical account of rational thought processes can provide a basis for objective truth is open to debate. However, it may be that ‘objective enough’ knowledge about the existence of the basic norm is possible by knowing shared subjective understanding of the basic norm, but that would require that Kelsen concedes that there is nothing absolutely true and objective about the existence of the basic norm. Rather, it requires knowledge about how each individual subject to a particular legal system understands and evaluates the bindingness of the basic norm.

⁶³ Secondary rules are meant to be the foundational rules upon which the primary rules are created and changed. Secondary rules are said to be power-conferring, whereas primary rules are meant to be duty-imposing. Perry, *supra* note 54 at p. 1182.

⁶⁴ Hart, *supra* note 5 at p. 90.

requirements of the rule of recognition is both empirically verifiable and descriptively possible.⁶⁵ For Hart, the rule of recognition is a social rule that is accepted by officials as a social practice from an internal point of view.⁶⁶ That is, the rule of recognition must be:

acknowledged by those officials who administer the law as specifying the conditions or criteria of validity which certify whether or not a rule is indeed a rule.⁶⁷

This certification of a rule as a legal rule must be internalized as binding and obligatory by the official accepting the rule as valid.⁶⁸ However, one may ask how knowledge about the official's internal acceptance of a power-conferring rule can be determined descriptively.

This brief overview of Hart and Kelsen does not do justice to the nuance and sophistication of their respective theories. However, both theories highlight many of the core issues in legal philosophy: how does one become obligated to the law, how is the law identified, and what makes the law authoritative? However, critically speaking, the answers that the legal positivists provide in attempting to derive a descriptive account of the law are not unassailable. There remain many questions about whether a pure understanding of law (or science) can be achieved without reference to any type of evaluation (moral or not). A major premise of this work is the claim that purely descriptive accounts of legal validity cannot be a purely value-free endeavor but instead require knowledge about values and evaluation at every step along the way. This does not always mean that such evaluation is always a moral evaluation, but it remains value-laden nonetheless. One may not have to evaluate the moral merits of a law to internalize it as a binding rule, but that does not negate the fact that a judgment of some kind is being asked as to whether such a 'feeling' of obligation exists.

For the purposes of this work, the conceptualization of Hart's social facts is especially important. There is nothing in the Hartian conceptualization of social facts that prevent value claims or moral claims from becoming a social fact. The limitation on social facts is their empirical verifiability. For Hart, social facts are empirically verifiable patterns of convergent behavior that are identifiable observationally. It is a central feature of this work that improved

⁶⁵ This means that there is never any need for moral evaluation in determining if the rule of recognition is satisfied.

⁶⁶ Hart, *supra* note 5 at p. 90.

⁶⁷ Wacks, *supra* note 61 at p. 28.

⁶⁸ The internal point of view may present some problems for a descriptive analysis of the law. How can one determine analytically whether or not a rule has been accepted from the internal point of view? Such a subjective concept might not be easy to verify empirically as a social fact. It requires an 'official' to make an evaluation or judgment about whether or not he or she believes that the conditions of the rule of recognition have been met. Only once this evaluation has been achieved can a legal rule be deemed as valid; and determining this in a sufficient objective (i.e. it is factually observable) manner may be difficult (however, this is precisely what Q methodology claims to be able to do).

value knowledge can result in making unobservable phenomena empirically observable through novel methodologies such as Q methodology. If it is true that such methodologies can map the many unobservable aspects of knowledge about value (subjectivities) that are contemplated by the subjective mind, and turn them outward so that they become observable phenomena, then there is no reason why such knowledge could not be included in the content of the law as social fact.

The question will of course turn on whether Q methodology can provide sufficiently observable information about the way that values are conceived and rationalized as internal aspects of the deliberative mind. If this question is answered in the affirmative, then positivistic theories about law (and nonpositivistic theories as well) can incorporate such previously unobservable phenomena into legal content as social fact. Social fact under such an understanding could include convergent behavior and also convergent mental processes about value (if made sufficiently observable). In other words, Q methodology can provide a method for taking what scientists consider to be only subjectively knowable and turning them into objectively knowable phenomena that meet the requirements of empirically verifiable synthetic (matters of fact) knowledge.

3.2 Legal Nonpositivism

In addition to the category of legal inquiry labeled legal positivism, there are a number of frames of inquiry that are distinct. These are what are being referred to generally as nonpositivist frames. All of these nonpositivist frames of inquiry hold that there is knowledge about values (moral value especially) that must be fully considered for any theory about law to hold. For the most part, these are not new theories, and for the entire history of human societies, philosophers have been attempting to sort out this relationship between morality and legality. Most of these theories fall into the category of natural law. Natural law theories are diverse, but generally can be understood as including two important tenets. The first is that:

law is best understood, at least in part, as a teleological concept: a concept or institution that can be properly understood only when the ultimate objective is kept in mind – here, the ultimate objective being a just society. This is in sharp contrast to the, generally descriptive, largely empirical, morally neutral approach one finds among legal positivists.⁶⁹

⁶⁹ Brian Bix (2002). 'Natural Law Theory: The Modern Tradition,' in Jules Coleman & Scott Shapiro, eds. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford, OUP, p. 76.

The second is that:

though the legal positivists might be able to offer what appears to be a simpler model of law (a model that bears a better-than-passing resemblance to law in practice), a view of law that included more about moral claims and moral aspirations of law would be a more complete, and therefore better, theory of law.⁷⁰

3.2.1 Natural Law

Natural law theories are a challenge to legal positivism conceptually. These theories about law claim that, unlike legal positivism, there is a necessary connection between legality and morality. However, natural law theories are not always in conflict with legal positivism. In many cases, human-made legal posits do constitute law for natural law theories. Where the natural law theorists differ is in claiming that the validity of the law should not to be assessed merely by the satisfaction of some criteria of authority, but also according to its merit. In this way, natural law theories can claim that unjust laws are not laws at all – regardless of their pedigree as authoritatively valid.

If, for example, as the positivists claim, that a morally unjust law can be shown to be legally valid, how can natural law theories hold that such evidence is patently false (in some cases)? If Nazi law was considered to be valid law – albeit bad law – how can the natural law theories show that Nazi law was not law at all? This is a conundrum that perplexes legal theorists who hope to understand law as being held to moral account. While it is difficult to justify the examples of tyrannical rulers using law for unjust aims, it is at least feasible to argue that the law (conceptually speaking) claims to be just. In the same way that positivists hold that law claims authority (even though it does not always attain it), natural law theorists can hold that law claims justice (even though it does not always attain it). The understanding of the law being made here is that there is something inherent in the concept of law that requires it to presuppose a claim to authoritativeness or justness. Positivists justify the claim to authoritativeness in that it is identifiable as a truth bearing proposition, while justice is not. Many positivists claim that while facts about the law can exist, facts about morality – and other values assumedly – cannot. A general observation among some natural law theorists who reject this view would claim that moral facts are indeed possible, and that these metaethical questions can be answered by appeals to one's reason.

Modern natural law theories come in many types. Most contemporary theories on the natural law tradition tend to eschew even using the term natural law (with the notable exception of John Finnis) and have chosen to focus on the process-based aspects of how a realistic jurisprudence ought to be configured.

⁷⁰ Id.

These process-focused theories tend to claim that legal positivism and its clinical isolation of the analysis of law is not very helpful in understanding how the law does (or should) be constructed in order to achieve the goals that it sets out for itself. In this way, contemporary natural law theories are less about nonhuman posited 'natural' law and rights that exist independent of human interaction, but are instead more focused on how human interaction makes the law what it is.

Modern natural law theories of the conceptual type state that a determination of what the law is requires the reflection of practical reason as much as the identification of what a legally valid rule is: only through the processes of judgment and deliberation can a true understanding of the law be achieved. By focusing on the internal operations of the mind as an important determinant of what the law is, natural law theories do not demand that moral knowledge be expunged from our conceptual understanding of the law. It is this process of reasoning about the law along moral or ethical grounds (what is right or good) that most clearly differentiates natural law theories from legal positivism. One of the main problems for nonpositivist theories lies in demonstrating how moral goods can be a component part of a descriptive legal theory even though such goods are not always expressible as truthapt propositions.

3.2.1.1 Ronald Dworkin

Ronald Dworkin presents his understanding about the conceptual nature of the law from the perspective that legal positivism fails to account for the cases when moral considerations – that are not identifiable as observable social fact – can still claim legalness. Much of Dworkin's focus is on what he calls interpretivism: a theory about law that seeks to add to a positivist understanding of the law. To do this, Dworkin develops his understanding of legal principles. It is these principles of law that are invoked frequently by legal decisionmakers despite not being able to meet the requirements of an observable social fact. He claims that these principles are value-laden and are not truthapt, but are used evaluatively in terms of their relevant weight. These principles, or value claims, require judgment and reason in their determination, and according to most legal and moral philosophers, they cannot ever qualify as social facts. Not only are these principles infrequently observable phenomena that relate to convergent behavior, they are not even capable of qualifying as facts because they involve value-based moral considerations, considerations that are said to be unnamable to factual analysis.

To explore his hypothesis, Dworkin famously calls upon what he says are the 'hard cases,' whereby a decisionmaker is compelled to derive the right answer

in a particular case when there is no posited law to apply.⁷¹ Unlike the legal positivists who would claim that a decisionmaker who cannot derive an exclusive interpretation of the law as based on a legal rule must apply nonlegal rules (so-called equity)⁷² to render an appropriate decision, Dworkin holds that there are principles in these hard cases that have the status of law and that decisionmakers are bound and obligated to apply them.⁷³ To give an example, Dworkin says that in the case of *Riggs v. Palmer*,⁷⁴ a plaintiff would benefit under a will to which he was a beneficiary even though he had killed the holder of that will.⁷⁵ According to Dworkin, the judge in that case – in looking only to the law as promulgated – would have had to permit the plaintiff in this case to prevail because there was no rule against such wrongdoing. Dworkin says that the judge resolved the case by invoking the following principle: “no man may profit from his own wrong.”⁷⁶ He states that this principle, even though it had never been invoked by the courts before, is a part of the law and forms a binding obligation on the judge to apply it.⁷⁷ He claims that such a principle is derived from morality and cannot be identified by a fact; and yet, it must be applied by the judge in this case – it is a moral requirement. Dworkin explains this requirement through a theory of law as integrity.⁷⁸

While the focus of Dworkin’s work is fascinating and presents a significant challenge to the source-based theories about law as supported by legal positivists, it raises as many questions as it answers. Some have criticized his interpretive theory as not a general theory about law, but as a much more modest particular theory of adjudication.⁷⁹ These critics hold that there is nothing in his interpretive theory that undermines legal positivism.⁸⁰ For example, if Dworkin is claiming that the application of legal principles can only be invoked in hard cases and that they can only be used to justify a just result, then these principles are not really a component of a descriptive theory about law but an interpretive tool for understanding ‘law’ that already exists in

⁷¹ Ronald Dworkin (1977). *Taking Rights Seriously*. Cambridge, Harvard University Press, p. 81.

⁷² Equity in this way is a legal term of art. It is not about equality. Rather, it is a claim that decisionmakers must provide nonlegal means for resolving a dispute when formalistic legal considerations would render an absurd result.

⁷³ In other words, he holds that the application of equity in legal disputes is not nonlegal at all. It is part of the law. See Dworkin, *supra* note 71 at p. 34.

⁷⁴ *Riggs v. Palmer*. 115 N.Y. 506 (1889).

⁷⁵ Dworkin, *supra* note 71 at p. 23.

⁷⁶ In analogizing with another similar case, the majority in *Riggs* held that: “[t]he principle which lies at the bottom of the maxim, *volenti non fit injuria* [to a willing person, no injury be done], should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.” *Riggs*, *supra* note 74 at p. 514.

⁷⁷ Dworkin, *supra* note 71 at p. 23.

⁷⁸ Dworkin, *supra* note 19 at pp. 176-224. The law is a seamless web that requires the judge to decide cases based on considerations that best fit and justify the law as a whole. He holds that when understanding the law in this way, there is always a ‘right’ answer to any legal problem.

⁷⁹ Leiter, *supra* note 9 at p. 27.

⁸⁰ *Id.* at p. 20.

some form.⁸¹ This account is probably a misunderstanding of what Dworkin is claiming however. He is stating that legal principles are applicable as valid law even though they are not social facts. These principles, according to Dworkin, only become identifiable in hard cases. So where do they come from? Dworkin says that they are a requirement of morality and that they derive from moral reason.⁸² It is a claim that morality can be understood objectively from the reasoning mind.

3.2.1.2 John Finnis

Probably the most celebrated thinker of the natural law tradition in the contemporary period is that of John Finnis. Finnis works in the tradition of Thomas Aquinas by attempting to integrate moral and legal philosophy through a focus on how legal knowledge and moral knowledge is identifiable by one's ability to reason. Finnis builds his theory about the law from a foundation of 'basic goods' that all human beings intrinsically value for their own sake.⁸³ They are objective goods that constitute "aspects of authentic human flourishing . . . real (intelligent) reason[s] for action."⁸⁴ These are goods whose ends and purpose can be chosen for their own sake, and not merely as a means to other ends. According to Finnis, these basic goods:

are grounded in human nature, not directly, in the sense of being read off a metaphysical theory, but indirectly, in the sense that '[t]he basic forms of good grasped by practical understanding are what is good for human beings with the nature that they have.'⁸⁵

Knowledge about these goods is derived from what he calls practical reasonableness. They are self-evident and Finnis believes that:

[t]here is no way of deducing the goods from something more fundamental because they themselves occupy an axiomatic position within our practical reason.⁸⁶

While the integration of his moral thought into the legal sphere is quite complex, the relevance here is that he is claiming that the law must be grounded in knowledge about these basic objective goods; and that the purpose of the law is to promote these aspects required for human flourishing. For Finnis, a descriptive account of the law cannot be moral value-free: a proper theory of law will require moral evaluation.⁸⁷ It will require moral

⁸¹ Id. at p. 24.

⁸² Simmonds, *supra* note 23 at pp. 212-13.

⁸³ His theory is rooted in the Aristotelian tradition of ethical thought whereby the concept of the good presupposes the right.

⁸⁴ John Finnis (1980). *Natural Law and Natural Rights*. Oxford, OUP, p. 64.

⁸⁵ Bix, *supra* note 69 at p. 86.

⁸⁶ Simmonds, *supra* note 23 at p. 117.

⁸⁷ Gerald Postema (2011). *A Treatise of Legal Philosophy and General Jurisprudence, Volume 11: Legal Philosophy in the Twentieth Century*. London, Springer, p. 558.

evaluation because law is a form of public practical reason, “stipulating solutions to problems of coordinating action in the pursuit of the common good.”⁸⁸ The common good “consists in the set of conditions which enables the members of a community to exercise practical reasonableness and lead flourishing lives.”⁸⁹

Finnis, like other contemporary theorists, rejects a utilitarian approach to justice (or law) because it fails to account for the fact that individuals hold differing views on what constitutes a valuable life. In this way, Finnis holds that while there are objectifiable goods that human beings ought to pursue, there is no absolute (or hierarchical) understanding of these goods that is possible because no set of individuals will value the same things.⁹⁰ For the purposes of describing what the law is, this claim poses a number of problems conceptually. It makes it extremely difficult to propose what a valid law would look like under these conditions. The answer that Finnis gives is that a legal obligation is to be treated presumptively as a moral obligation; and that internalizing this perspective as a requirement of practical reasonableness will constitute the central case (the concept in its fullest sense) of the legal viewpoint (sense of obligation).⁹¹ Such a conceptualization of the law is said to be sufficient to move Finnis “across the border from legal positivism (law conceptually separated from morality) to natural law theory (moral evaluation central to understanding law).”⁹²

3.2.2 The Shift to Legal Process

While Finnis and Dworkin (arguably) can be seen as direct challenges to conceptual legal positivism, there are additional theories in the nonpositivist tradition that indirectly challenge legal positivism by holding that the whole idea of a conceptual understanding of the law is misguided. These process-based theorists generally hold that our understanding of the law must be seen as a process in particular social context. These theories demand that the law as it is must be teleological in orientation. An understanding of the law only makes sense when viewed in the context of its goals. For many of these theorists, the law can only be understood in the context of process, decision, and justice. In accepting this nonpositivistic view of legal understanding, the

⁸⁸ Id.

⁸⁹ Simmonds, *supra* note 23 at p. 125.

⁹⁰ As Finnis understands them, these objective goods are: “*ultimate* and irreducibly *normative*, providing fundamental reasons for action and for social arrangements and institutions, and grounding all practical normativity; *objective*, independent of inclination and preference; *abstract*, needing to be articulated or specified in order to provide concrete guidance; irreducibly *plural* and diverse; and *incommensurable*, submitting no rationally grounded metric or principle of priority [emphasis in original].” Postema, *supra* note 87 at p. 551.

⁹¹ Bix, *supra* note 69 at p. 89.

⁹² Id.

point of this work is not to undermine the positivist project; rather, it is to claim that the positivist project can be enhanced through two nonpositivist theses: 1) that value (especially moral) knowledge is a requirement of the law (so long as it can be objectively known), and 2) that conceptual knowledge about the law requires an understanding of the teleological purpose of the law (a claim that can only be identifiable by an interactive and process-based approach to law).

3.2.2.1 Lon Fuller

Lon Fuller's criticism of legal positivism can be summarized as follows:

(a) legal positivism treats law as an object – an object of study, like any other subject of scientific or quasi-scientific investigation – when it is better understood as a process or function; (b) legal positivism seems to believe, or assume, falsely, that the existence or non-existence of the law is a matter of moral indifference; and (c) legal positivism presents law as a 'one-way projection of authority,' when it is better understood as involving reciprocity between officials and citizens.⁹³

Law, for Fuller, is a human project that is "an enterprise of subjecting human conduct to the governance of rules."⁹⁴ Law is thus a process whose purpose is primarily aimed at helping citizens coexist, cooperate, and thrive;⁹⁵ and once one takes such a function-based approach to law, it begins to make more sense to claim that an unjust law is not a law at all. For the law to serve its function, it must have the aim of being both legally and morally valid. Law under this view is best understood as an interactional model of governance whereby there is reciprocity between typical lawtakers and lawgivers. Only when officials and citizens cooperate, each fulfilling his or her function, can law work.

What Fuller proposes as an alternative to legal positivism is what he terms the components of legal understanding that constitute the 'inner morality' of law.⁹⁶ He declares that there are eight principles of legality that set a minimum criteria of excellence towards which any good government would strive. These eight principles on the legality of rules are: 1) that rules must have general application, 2) they must be promulgated, 3) they must not be retroactively applied, 4) they must be understandable, 5) they should not be contradictory, 6) they should not be impossible to obey, 7) they should remain constant through time, and 8) there should be congruence between the rules as

⁹³ Id. at p. 77.

⁹⁴ Lon Fuller (1969). *The Morality of Law, Revised Edition*. New Haven, Yale University Press, p. 106.

⁹⁵ "Unlike modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort." Id.

⁹⁶ Id. at p. 41.

announced and as applied.⁹⁷ Whether these eight principles are in fact moral obligations or not has been a constant source of criticism from legal theorists.⁹⁸ While Hart held that he has no argument with the claim that such principles would likely result in a more efficient legal system, he objected to the claim that such requirements are moral in any sense.⁹⁹ He also criticized the idea that a set of largely procedural aspects of law – even if just – could not guarantee the substantive rules identified by such procedures would be necessarily just.¹⁰⁰

3.2.2.2 The Legal Process School

Around the middle of the twentieth century, and at the same time that Fuller and Hart were debating the conceptual nature of law and morality, a new school of thought was emerging. While Fuller's theory about the inner morality of law was aimed at a broader conceptual jurisprudence, his ideas about process have also had a profound impact in the United States (US) on how the process of adjudication ought to be approached. The legal process school developed in the 1950s and 1960s, and can be seen as a reaction against the realist interpretation of law by certain judges on the Warren Court.¹⁰¹ It claimed to be able to formalize some aspects of decision in a way that embraced a process-based rule of law approach to legal decisionmaking, while at the same time limiting the broad (and subjective in the negative sense) interpretive tools attributable to legal realism.¹⁰² In this way, the legal process school can be seen as attempting to forge a middle path between positivistic formalism and nonpositivist realism in adjudication.¹⁰³

The basic idea of such a rule of law focus is that the best indicator of an efficient legal order lies in both the correct distribution of legal tasks among the various institutions of government, and in the correctness of the processes of procedure adjudicators must follow.¹⁰⁴ A proper system of adjudication is one that guarantees its subjects a minimum level of procedural justice; and

⁹⁷ Id at p. 39.

⁹⁸ See most prominently the Hart-Fuller Debate. HLA Hart (1958). *Positivism and the Separation of Law and Morals*. Harvard Law Review. Vol. 71, p. 593; Lon Fuller (1958). *Positivism and Fidelity to Law: A Reply to Professor Hart*. Harvard Law Review. Vol. 71, p. 630.

⁹⁹ HLA Hart (1983). 'Lon L. Fuller: The Morality of Law,' in HLA Hart, *Essays in Jurisprudence and Philosophy*. Oxford, Clarendon Press, p. 343.

¹⁰⁰ Id. at p. 350.

¹⁰¹ This was the period when Chief Justice Earl Warren was the chief justice of the US Supreme Court. It is a period where critics claimed that the Court was engaged in an excessive amount of policymaking.

¹⁰² See Henry Hart & Albert Sacks (1958). *The Legal Process: Basic Problems in the Making and Application of Law*. Rochester, Foundation Press.

¹⁰³ Mark Tushnet & Timothy Lynch (1994). *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*. Constitutional Commentary. Vol. 11, pp. 463, 476-80.

¹⁰⁴ Dennis Patterson, ed. (2010). *A Companion to the Philosophy of Law and Legal Theory, Second Edition*. Oxford, Wiley-Blackwell.

that one of the key means for assuring such processes of adjudication is to minimize the possibility of arbitrary decision (or decision that is based on the policy choices of the decisionmaker). To do this, the legal process school provided a theoretical justification for judicial restraint based on:

an approach that would help select who should be the definers and determiners of the values that would guide the legal system.¹⁰⁵

It claimed that this could be accomplished by shedding light, neutrally, on the particular attributes of government institutions; and determining which institutions were best suited to decide some issues rather than others.¹⁰⁶ Implicitly, this required that judges refrain from making policy through their decisions when such a policy determination was best suited for another branch of government.¹⁰⁷ These legal process theorists were not focused on the conceptual nature of what the law is, but on the ways in which a legal order ought to make decisions. It is a theory of adjudication rooted in the idea that a proper understanding of the law requires a restrictive view of judicial legal interpretation.

3.2.2.3 Legal Realism

In the same way that the legal process school is considered a theory of adjudication, legal realism is likewise a theory of adjudication, not a conceptual theory. However, some claim that theories of adjudication are in fact what ought to be considered the concept of the law.¹⁰⁸ It is unclear whether all legal realists would endorse such a view. In general, legal realism refers to an intellectual movement among a group of academics and lawyers in the 1920s and 1930s in the US who thought of themselves as taking a more realistic look at how judges decide cases.¹⁰⁹ Legal realism has a wide array of definitions in the discourse and has been often confused with both political realism and conceptual theories about law.¹¹⁰ However, legal realism really claims neither. Rather, it is most accurately seen as a broad theory for legal interpretation by decisionmakers in the judicial context.

¹⁰⁵ Guido Calabresi (2003). *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*. Stanford Law Review. Vol. 55, pp. 2113, 2123.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes (1881). *The Common Law*. Boston, Little Brown, p. 5.

¹⁰⁹ . Brian Leiter (2010). *Legal Formalism and Legal Realism: What is the Issue?* Legal Theory. Vol. 16, p. 111.

¹¹⁰ In contradistinction to American legal realism, there is also a school of thought called Scandinavian legal realism based primarily on the ideas of Swedish philosopher Axel Hägerström. Legal realism also holds some similarities with sociological jurisprudence, but they are distinct schools of thought.

Legal realism seeks to understand legal decisionmaking as an institution of law that does not deny or distort the moral, social, and political context to which legal conflicts are inescapably intertwined.¹¹¹ Under such a reading, legal realism holds that legal decisionmaking should not be done in isolation from reality.¹¹² Legal realism endorses a number of key concepts, which include the following: 1) the belief in the indeterminacy of reasoning about, and interpreting the law,¹¹³ 2) the view that the law could be used as a tool to achieve social purposes (instrumentalism),¹¹⁴ and 3) the belief that judges do – and in fact, must – draw on extralegal considerations in making decisions.¹¹⁵ One of the main strengths of this jurisprudential outlook is its provision of an explanation for why legal decisionmaking should not occur in a vacuum: decisions are – and should be – derived from a complex process whereby law, politics, and society interact with, and influence each other, in myriad ways.

3.2.2.4 The New Haven School

In the early- and mid-twentieth century, there was a large amount of intellectual attention being paid to both theories about law and theories about decision; and to how an understanding of one could lead to an enhanced understanding of the other. At the forefront of this approach was that of two Yale professors, Harold Lasswell and Myres McDougal (and prominently carried forward and advanced by Michael Reisman).¹¹⁶ Their project, which has come to be known as either policy-orientated jurisprudence, configurative jurisprudence, or the New Haven school, is a theory about law that seeks to focus legal inquiry on the process of legal decision in the larger social context.

¹¹¹ Brian Leiter holds that: “the majority of Realists advanced a descriptive theory of adjudication according to which (1) legal reasoning is indeterminate (i.e., fails to justify a unique outcome) in those cases that reach the stage of appellate review; (2) appellate judges, in deciding cases, are responsive to the ‘situation-types’ – recurring factual patterns (e.g., ‘seller of a business promises not to compete with the buyer, and then tries to break the promise’) – that elicit predictable normative responses (‘this is unfair’ or ‘this is economically foolish’) from most jurists, responses that are not, however, predictable based on existing ‘paper’ rules and doctrine; and (3) in the commercial law context (a primary focus of the Realists), judges look to the ‘normal’ practices in the existing business culture in deciding what is the right outcome (that is, the judges treat normal economic practice as the normative benchmark for decision).” Leiter, *supra* note 109 at p. 112.

¹¹² Patterson, *supra* note 104 at p. 249.

¹¹³ The indeterminacy thesis is a jurisprudential view about the indeterminacy of legal reasoning such that judges do have choices to make and can quite properly construe rules and precedents in different ways. See Leiter, *supra* note 109 at n. 56.

¹¹⁴ See generally Brian Tamanaha (2006). *Law as a Means to an End: Threat to the Rule of Law*. Cambridge, CUP.

¹¹⁵ Fredrick Schauer (2012). *Legal Realism Untamed*. Virginia Public Law & Legal Theory Research Paper No. 2012-38, available at: <http://ssrn.com/abstract=2064837> (last accessed 1 September 2013).

¹¹⁶ See Myres McDougal, Harold Lasswell, & Michael Reisman (1967). *Theories about International Law: Prologue to a Configurative Jurisprudence*. Virginia Journal of International Law. Vol. 8, p. 188; Lasswell & McDougal, *supra* note 20.

Their initial call to action, however, stemmed from a perceived inadequacy in American legal education.¹¹⁷ This inadequacy was based on an understanding of law that could never be isolated from the power structures of political and social reality. Likewise, they held that a descriptive theory about what the law is one that must not focus on abstract conceptual notions seeking to discover legally valid rules in isolation from social process, but that the only way to identify the law was to look at the ongoing process of legal decision. Furthermore, they claimed that knowledge about the law required inquiry into the goal and purpose that the law seeks to achieve. For them, the purpose of the law must be evaluated against its capacity to promote and maximize the values of human dignity.¹¹⁸

As such, policy-orientated jurisprudence claims to be an addendum to legal realism in that it seeks to expand understanding about the law in a way that extends far beyond the particular adjudicative scope of legal realism. The theory that Lasswell and McDougal proposed sought to do two things: 1) describe law both conceptually and as an ongoing process of authoritative and controlling decision; and 2) to evaluate the normative content of the law as part of the law by measuring it against a posited set of human dignity values.¹¹⁹ They sought to comprehensively map a theory about law that refuses to limit legal understanding to specific modes of inquiry, but instead integrates all theoretical knowledge about decision, law, and justice under a single theoretical approach. Further, it claims to be applicable to all legal understanding: from the most local (including the normative social relations in everyday life)¹²⁰ to the most global (including all international law – and even space law).¹²¹

There is of course the risk that such a comprehensive approach will be overly complex. There is also the problem relating to the theory's reliance on subjective value knowledge as the normative aim of law. Their theory is subjective for all of the reasons given in this Chapter and the preceding one: by claiming to make evaluative normativity as a component part of their theory (usually this is something reserved for theories about justice), it makes an understanding about law as contingent on value knowledge.¹²² In aiming an understanding about law as a continual process of authoritative and

¹¹⁷ Harold Lasswell & Myres McDougal (1943). *Legal Education and Public Policy: Professional Training in the Public Interest*. Yale Law Journal. Vol. 52, p. 203.

¹¹⁸ See Myres McDougal, Harold Lasswell, & Lung Chu Chen (1980). *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*. New Haven, Yale University Press.

¹¹⁹ Lasswell & McDougal, *supra* note 20 at pp. 3-38.

¹²⁰ See Michael Reisman (1982). *Looking, Staring, and Glaring: Microlegal Systems and Public Order*. Denver Journal of International Law & Policy. Vol. 12, pp. 165.

¹²¹ Myres McDougal, Harold Lasswell, & Ivan Vlasic (1964). *Law and Public Order in Space*. New Haven, Yale University Press.

¹²² This is something which most legal scholars consider to be evaluative and therefore subjective.

controlling decision that must be evaluated in terms of its capacity to promote and maximize the values of human dignity, this jurisprudential outlook must be explained according to these seemingly subjective terms. It is for this reason that many scholars have held that conceptualizing law in this way just opens the door wide open for decisionmakers to make decisions about law in an entirely subjective (in the negative sense of the term) way. Such a claim is of course based on the idea that objective knowledge about value (to which their theory aims) is impossible to know: a claim that this work is attempting to overcome.

4. JURISPRUDENCE AND VALUES

The purpose of this Chapter so far has been to identify some of the major features about the law from varying perspectives about concept, content, decision, and justice. This focus has attempted to map the various perspectives on the ontology and the epistemology of law (and value); that is, how does one gain knowledge about the law (and about values) and under what conditions and circumstances does it (and value claims) exist. Such a focus has identified that a scientific understanding of the law holds that it must be rooted in identifiable propositions that are capable of being truthapt. This has been the focus of legal positivism and creates real problems for legal nonpositivism in that they claim that there are aspects about the nature of law that can only be derived from reason. If a priori practical reason is a source of knowledge about the law, then legal positivism fails by excluding it. Practical reason (reasons for actions) is value-laden: it requires choices and judgments to be made about what right reason requires. If these components cannot meet the objective mandate of scientific and positivistic descriptions of what the law is, then they will fail to become identifiable as social fact in the way that legal and sociological positivists demand. For most legal positivists, such objective knowledge can never become identifiable independently of social fact; rather, they must always be included within the content of an identifiable social fact.

As such, almost all of the judgments made about value are excluded from ideas of legality. One way to address this problem is to make these processes of the mind amenable to observation. In the early part of the twentieth century, these psychological insights were limited by behaviorism. Behaviorism is a form of psychological positivism in that it claims that the only psychological knowledge that is valid must be empirically observable in some way.¹²³ While such a limitation is almost identical to the limitation found in reducing the content of the law to social fact, the development of the cognitive sciences has opened new avenues for mapping conscious and

¹²³ See BF Skinner (1984). *The Operational Analysis of Psychological Terms. Behavioral and Brain Sciences*. Vol. 7, pp. 547–81.

unconscious mental processes in a way that makes them observable for reflection by the scientist. If such methodologies have relevance for the social sciences in general, and the law specifically, it is in their ability to make unobservable and inherently subjective processes of the mind observable.

This is the basic claim of this work: psychological methodologies can expand epistemically the corpus of information about value judgments that currently fails to meet the mandate of objectivity in the law. Q methodology, the method being explored as a means for justifying the theoretical foundations of this work, claims to be able to shed new light on these unconscious subjectivities in a way that can be measurable. While this is a tall order to fill, it will hopefully expand the discourse on the possibility of objectively gaining knowledge about value judgments in a manner that sufficiently qualify as social fact. The basic claim is that value facts are possible.

Central to all of these discussions, and something that is a reoccurring feature in all discourse about the law is the role and relevance of morality. The defining feature between legal positivism and legal nonpositivism is whether or not moral evaluation is a component part of what makes the law law. The reason why such a divergence is so central to legal understanding is not because legal positivists are amoral, callous, and cynical; but because they are skeptical about the possibility of moral knowledge that is scientifically unobservable. For example, there is nothing in Hartian legal positivism that would preclude moral principles from being a part of a descriptive account of what the law is. However, they must be empirically verifiable as social fact.

For example, the principle of 'equal protection under the law' can be a legally valid postulate, but it must understood as a product of social fact (actual behavior, such as how courts have actually interpreted such a principle). My understanding of 'equal protection under the law' is a moral judgment, but not a legally valid one. The nonpositivists would also hold that my understanding of 'equal protection under the law' is a moral judgment, but that it could become a legally valid one if it comports with practical reasonableness that is shared and universally cognizable. Both approaches require an element of objectification in order to qualify as law. Neither approaches to legal understanding would permit mere opinion to qualify as sufficiently valid to verify legality.

4.1 The Verification and Justification Problems

At the core of any inquiry into value knowledge in the context of the law is what can be called the verification-justification problem. Whether or not one is explicitly knowledgeable about the philosophic underpinnings of such a distinction, they will be familiar with its practical implications. The

implications of such a distinction are that they reference the modes of inquiry for knowing law (fact) and value. Verification of the law as law is the main concern of conceptual positivism. Positivists seek to identify what the law is; and the tool that is used for such analysis is its verification. Only those rules, norms, or laws that are empirically verifiable can qualify as valid legal rules.

Rules, norms or laws that are not verifiable in this manner cannot meet the mandate of legal validity; they are considered subjective in the sense that they cannot be objectively knowable. If such subjective considerations were permitted to count as law, then anything could be considered law, and anyone could claim it to be so. To avoid this problem, positivists require that the law must be verifiable. The verification requirement follows from the logical positivists and the concepts about the limits of what can qualify as a scientific fact. As noted in the previous Chapter, the criteria for verifiable fact as applied to the social sciences and to law are restricted to what might be called objective fact (analytic and synthetic knowledge).¹²⁴

Justification, as opposed to verification, is the concern of practical reason: what are the reasons justifying a particular action? The validity of a value claim or demand cannot be verified as empirically observable fact. What then are the tools of inquiry available for gaining knowledge about values? Generally speaking, the tools of justification are those which can be used to evaluate the merits of a particular value claim. According to this view, values are not verifiable in the same ways as facts are. While this claim is subject to the way that different philosophic approaches view the nature of facts and values, the basic structural argument is to hold that knowledge about facts must be verified and knowledge about value must be justified. Under this view, facts are absolute concepts: they can be written as true or false propositions. Values, on the other hand, can gain or lose currency relative to the reasons used for their justification. It is claimed that values are not capable of being verifiable in the empirical sense.

However, if one claims that values and evaluative understanding about the law play a central role in both the description and function of a realistic system of law, then it is useful to ask if there is any possibility of value inquiry (as a mode of justification) meeting the mandates of legal verification. This question often arises in the context of law when attempting to incorporate knowledge about how one ought to act (value demands) into a framework of factual legal inquiry. If knowledge about normativity can only be gained through justification, how can such knowledge ever meet the mandate of empirical verification? This is exactly the problem that legal philosophy attempts to answer in delineating between what is law (factual inquiry) and what is justice (normative inquiry).

¹²⁴ See Chapter 2, Section 2.

The distinction between factual verification and value justification may be the most important epistemic problem for law in terms of gaining value knowledge. How can justification be empirically verifiable? There are two ways to answer this question. The first is to claim that the reasons for justifying a particular value position is only verifiable if the reasons given to justify a particular value position reflect a pattern of behavior that is identifiable externally to the person holding that view. For some moral principles that form a part of the law – such as the principle of good faith – the verification of such a principle empirically is a project of deriving its meaning from the way that decisionmakers have made laws – or resolved disputes – using a certain set of justificatory reasons for doing so.

The second answer would be to verify justification for a particular value claim by measuring how such a justification about value is shared among a particular group, community, or society. This takes the project of what makes law law out of the hands of authoritative decisionmakers and proposes a bottom-up alternative for determining when a set of reasons for justifying a particular value is valid. Most legal scholars are skeptical about such an approach because such information is viewed as subjective, and that the only way to determine the merit of a set of justificatory reasons for advancing a particular value claim is to ask every community or society member to state their reasoned opinion.

The problem here is that even if you are able to ask such questions, the possibility of getting ‘real’ answers is questionable. Most people – when asked about the reasons for their value positions – will answer according to how they think they are supposed to respond. However, such ‘real’ answers may be impracticable, but they may not be impossible. The point here is that if one can show a level of shared understanding about what counts as good reasons for the justification of a particular value claim or perspective, then such knowledge would go a long way in making the claim that value knowledge – as an overlapping consensus as derived from shared subjectivity – is not only possible, but may actually be verifiable enough to constitute social fact.

4.2 Shared Subjectivity About Value

In moral philosophy, the idea that value facts are possible is a central feature in general ontological and epistemological discourse. There are many that claim that there is just not anything to know about values – at least nothing that even remotely resembles what one can call a fact. These claims about various forms of value noncognitivism or emotivism do not even allow for the possibility of a priori reason (or emotion, feeling, or belief for that matter) as a metaphysical foundation of value knowledge. For these philosophers, however, the deep skepticism about value knowledge is not particularly relevant to any

attempts at improving knowledge value knowledge because *no* knowledge is possible. For those holding that the reasoning mind is capable of generating real knowledge about value, then attempts at improving knowledge about these subjective (internal to the self) processes of the mind may be capable of benefits from methodologies in the cognitive sciences and psychology.

However, it is important to state that what these philosophers are claiming skeptically about the existence of value is an ontological claim, not an epistemological one. Even Hume, who was deeply skeptical about the existence of moral value, would not hold that there was nothing to know about it. Rather, he held that moral value was a product of desire – it was rooted in what he called the sentiments of human beings. Likewise, while neo-Kantian scholars might reject the Kantian ontological claims about the existence of moral value as a product of a priori reason, they would never hold that there was nothing to know about value.

Even those skeptical about the metaphysical claims being made about the existence of value would not claim that there is nothing one can know about it; they are merely making the claim that such knowledge is subjective and not amenable to objective (universal) verification. How one person thinks about (reasons) or feels about (emotions) a particular value is epistemically subjective. Their claim is that knowledge is possible about how a person reasons or emotes about a particular value judgment. It is measurable in the sense that if one was to ask that person what their position on a particular aspect of morality, they could tell you. The claim they make is that if one was to ask a large population of people the same question about a particular value, one would get a range of responses, but that those responses would be knowable epistemically speaking. Furthermore, they would claim that there would be a limited range of responses, and that shared patterns of thinking and shared patterns of feeling among these individuals would emerge in a way that are objectively identifiable even though they are originate as subjective (internal to the self) thoughts and feelings.

This is where divergent possibilities about objective value knowledge emerge. For those that view the possibility of value knowledge only emerging as patterns of shared behavior (such as Hartian social facts), value knowledge must be externally knowable from practice (behavior and actual actions). For those that view the possibility for value knowledge as emerging from patterns of shared thought (reason) or feeling (emotions), value knowledge is internally knowable. In this sense, behavior is objective, while thought and feeling is subjective. The question for one seeking to objectively identify patterns of shared thought and feeling is whether or not these internal processes of the mind can be reflected externally as observable knowledge.

While those who are deeply skeptical about the very existence of value would say that there is no possibility to identify such shared patterns of thought and

feeling, those who are agonistic about the ontology of value would remain committed to finding ways to make these shared patterns of thought more externally observable through processes and methodologies aimed at gaining such knowledge. This is precisely the position being advocated in this work. This work claims that a method like Q methodology can assist in identifying these shared patterns of thoughts and feelings about a particular value claim or judgment – despite their subjectivity.

CHAPTER 4

VALUES AND INTERNATIONAL LEGAL THEORY

1. INTRODUCTION

This Chapter intends to focus on international law generally, and evolving international legal orders specifically. The purpose of such a focus is to look at what is international law, how and when it matters and works, and what role values and evaluation play in the development of international legal thought and understanding. International law has always been plagued by a dualism that separates municipal law from international law. This Westphalian duo,¹ as it is called, dramatically limits theorizing about international law because it forces theorists to conceptualize international law as either a type of domestic law or as a distinct concept that is completely separate from law within sovereignty.²

However, the concept of law – the idea about what makes an entity or phenomenon legal – should apply at all levels of theorizing: legality exists independently of sovereignty.³ This is not an insight that early legal positivists, especially figures such as John Austin, fully endorsed.⁴ Austin conceptualized legality as authority emanating from sovereign command. For international law, the sovereign command theory meant that all law facing outward from sovereignty was what Austin called ‘positive morality’:⁵ an idea that there was nothing authoritatively binding and enforceable outside of sovereignty that could ever meet the requirements of legality within sovereignty.

International law as viewed through this lens of traditional positivism (of the pre-Hartian type) would claim that international law cannot be more than a set of primary rules agreed to by states. International law in this form is both static and largely anachronistic. It also fails to be controlling: that is, without

¹ William Twining (2009). *Globalisation and Legal Scholarship*. Nijmegen, Wolf Legal Publishers, p. 39.

² The problem with this conceptualization is that its detractors demand that international law is not only something distinct from municipal law, it is not law at all.

³ See generally Robert Sloane (2009). *More Than What Courts Do: Jurisprudence, Decision, and Dignity – In Brief Encounters and Global Affairs*. Yale Journal of International Law. Vol. 34, p. 517.

⁴ See Chapter 3, Section 3.1.1.

⁵ Most contemporary positivists would consider positive morality to count as law. ‘Positive’ morality are those behaviors and habits that are customarily practiced. In this way, Austin was not likely critiquing anything about morality per se; rather, he was claiming that these customs and habits (positive morality) *could* constitute law in the domestic context because, when linked with a coercive threat of sanction, a social habit or custom could become law. However, outside of sovereignty, no such threat of sanction could be delivered; and thus, an important (for Austin, a fundamental) component of legality was missing. International law was not law at all. It was ‘posited morality.’

the threat of a sovereign backed sanction, law fails to obligate its subjects. Overcoming this hurdle remains one of the most difficult areas of international legal philosophy for the fundamental reason that conceptual models about legality have been understood for the past four hundred years in terms of territorial sovereignty.⁶ Such a concept has traditionally meant something very simple, but at the same time it has also been limiting for international law: a sovereign has absolute authority within its territory and no authority outside of its territory.⁷ In the postmodern era, this of course has changed and there are few, if any, states in the world that claim absolute authority within their borders and no authority outside of them.

As such, most contemporary international legal thought is devoted to showing that international law is not a set of primary rules, but a sophisticated and proper system of law; and that international law is capable of obligating despite its inability to provide a threat of sovereign sanction. Critical to this discourse is the understanding of international law as capable of legality through defined sources and secondary (constitutive) rules of change, adjudication, and recognition.⁸ Ironically, much of this shift in understanding international law can be derived from HLA Hart's reconceptualization of Austinian positivism⁹ and its aim of decoupling legality from that which is backed up by a sovereign threat of sanction. Primarily through his mechanism of rule acceptance from the 'internal point of view,' Hart was able to demonstrate that legality emanated not from a sovereign but from a sense of obligation internalized by legal 'officials' making and applying the law.¹⁰ The irony is that while Hartian positivism opened the door for explaining legality

⁶ For convenience, this is a reference to the approximate start date of the modern concept of sovereignty which dates from the *Peace of Westphalia*. 15 May 1648 & 24 October 1648.

⁷ This notion of absolute sovereignty as expounded by Jean Bodin and Thomas Hobbes must largely be considered a relic of the past. It still provides a good theoretical idealization of the concept of sovereignty, but practice in this postmodern era of globalization and interdependence alerts us to the fact that very few states understand their relationship with other states in such absolute terms.

⁸ Such a focus mirrors Hart's theory about secondary or constitutive rules that allow for primary rules to change and evolve over time. The constitutive features of international law also feature heavily in the policy-orientated jurisprudence. Many claim that secondary rules do not exist in international law. If one requires secondary or constitutive rules to mimic those in domestic legal systems, then yes, they likely do not exist. However, if one views the secondary rules as a constitutive process about how decisions will be made in the international arena, then it is likely international law does contain such secondary rules. "I believe it is clear that international law does have secondary rules – or their rough analogue, what the New Haven School denotes constitutive processes, viz., decisions about how decisions will be made, where, and by whom." Sloane, *supra* note 3 at p. 519.

⁹ Hart [1961](1997). *The Concept of Law*, edited by Joseph Raz. Oxford, Clarendon Press, p. 113.

¹⁰ In some ways, the sense of obligation that is internalized by officials who are determining a legal rule as valid is similar to the requirement of *opinio juris* in formulating customary international law. However, this so-called subjective element of custom is said to be descriptively possible under Hart's conceptualization. Unless one is able to infer obligation from practice (Hartian social fact), it appears to be a challenge as to whether a descriptive account of legal obligation (in both Hartian positivism and in the formation of customary international law) can be understood from actual behavior alone.

independent of sovereignty, Hart had very little to say about international law.¹¹

While Hart's understanding of legality has been influential on all legal theorizing, its direct influence on international law has been limited. For international law, the most profound influence on its development over the past hundred years has been in relation to the way that states view their own sovereignty. It is these postmodern versions of sovereignty that are largely creditable to the development of international law and to the influence that it has had on shaping politics and power outside the territory of a particular sovereign.¹² However, it is this mention of politics and power that may be the most defining feature of contemporary international law and is why many believe that it is distinct from municipal law and other localized microlegal processes. While these features of politics and power are relevant in all social interactions, it is claimed that they are more relevant at the international level.

Skeptics of international law hold that without a centralized authority (such as a world government) or a centralized ability to control (such as a global police force), international law is not capable of being law at all.¹³ Supporters of such a view claim that the structure of territorial sovereignty prevents law outside sovereignty from existing; they claim it is merely a tool of self-help that is used by the powerful to advance political and economic objectives.¹⁴ While this view holds an extreme side of the spectrum, the other extreme is a position holding that an international rule of law can function in a manner identical to a domestic rule of law.¹⁵

These extremes in international legal understanding can be labeled as political realism at one end and legal idealism at the other. They are views about law that are both overly pessimistic (political realism) and overly optimistic (legal idealism) about international law. However, there are also a whole host of contemporary theories in between these two views that claim to provide the best explanation for the phenomenon called international law. It is postulated that it is along this spectrum that the definitive characteristic in their

¹¹ Jeremy Waldron (2009). 'Hart and the Principles of Legality,' in Matthew Kramer et al., eds. *The Legacy of H.L.A. Hart*. Oxford, OUP, pp. 67, 68-69.

¹² The use of the terms 'postmodern' and 'sovereignty' is not intended to state a complicated theory. Rather, it is merely a claim that the concept of absolute sovereignty as described in the modern period is no longer used in understanding the power of states. A postmodern sovereignty is one that understands sovereignty through the lens of state interdependence.

¹³ This of course equates legalness with domestic understandings of the concept. It may be that international legalness exists, but that its existence is not recognizable if viewed exclusively as analogous to domestic legal systems.

¹⁴ This view holds that international law does not exist, or only marginally so. For our purposes, this understanding of the law will be labeled *political realism*.

¹⁵ This view holds that an international rule of law is possible. For our purposes, this understanding of international law will be labeled *legal idealism*.

distinction is the amount of subjective value considerations that should be permitted in any explanatory or descriptive theory about law.¹⁶

At the international level, it is likely that the most accurate theory about law is situated somewhere in the middle. Power matters due to the structural nature of law from outwith sovereignty, but the law properly so called also plays an increasingly significant role in shaping the behavior of both state and nonstate actors working in an international or global context. There are a number of theories that seek to chart this middle path between political realism and legal idealism, but it is claimed in the context of this work on value knowledge that it is the policy-orientated jurisprudence (also called the New Haven school) that charts this course most accurately.¹⁷

Policy-orientated jurisprudence defines law as the ongoing process of authoritative and controlling decision;¹⁸ and that decision of this kind ought to aim at the pursuit of human dignity.¹⁹ Human dignity, according to this approach, is about access to the things that all human beings want and need (the things that human beings value).²⁰ In this way, the policy-orientated approach requires evaluation about the 'right' distribution of values in the context of legal decision. In order to know how a decision in a particular context ought to be determined, it must be seen in its social context. Under such a view, the law is both purpose and value orientated.²¹ It is a theory

¹⁶ See Chapter 1, Section 2. A defining attribute of both normative and descriptive theories about international law is the amount of unposited value subjectivity that will be tolerated. From the most intense or extreme forms of legal positivism (and its adjudicative derivative, formalism) to the most law-denying forms of political realism, all legal theories can be categorized according to their subjective components (or attempted denial of such). The subjective value chain that can be described according to this claim might look like this: precepts-principles-policies-politics-power. It is somewhere along this spectrum that all international legal theories fit. From this perspective, policy-orientated jurisprudence sits to the right of center in this regard, and therefore is likely to be amenable to a project – such as this one – that is attempting to provide new techniques for advancing value knowledge in the context of jurisprudential thought. The policy-orientated approach is an amalgamation of realist and idealist thought in jurisprudence. It claims to be a theory about law and thus rejects the far right end of the spectrum of law-denying political and power realism. At the same time, it claims to describe law, not as a scientific artifact separable from goal- or value-orientation, but as a process of decisionmaking that is more amenable to subjective thought than those legal theories at the far left of the spectrum such as legal positivism (or even natural law theories – such as those claiming that objective rules exist, just not always in a posited form).

¹⁷ In fact, it is Michael Reisman's development of the New Haven school that has been labeled realistic idealism: an outlook that attempts to understand international legal 'reality' as a synthesis of both realism and idealism. See Sloane, *supra* note 3 at p. 517.

¹⁸ Myres McDougal, Harold Lasswell, & Michael Reisman (1968). *Theories About International Law: Prologue to a Configurative Jurisprudence*. Virginia Journal of International Law. Vol. 8, pp. 188, 192.

¹⁹ *Id.* at p. 193.

²⁰ *Id.* at p. 201.

²¹ E.g. Lasswell and McDougal explain the value orientation of their policy approach: "science is sometime said to be value-free; and yet it the most obvious fact about policy is that it is value-orientated, since policy is only intelligible when it is seen as a deliberate search for the maximization of valued goals." Harold Lasswell & Myres McDougal (1992). *Jurisprudence for a*

about law that is both descriptive and evaluative, with value inquiry being central to such a pursuit.

The goal of this Chapter is to describe the various approaches to international law in terms of the ways that subjective value knowledge is approached. It is hoped that this can demonstrate, not only that values and evaluation matter in international legal theory, but also that improved knowledge about them can give the scholar or theorist the tools for understanding international law that can map the phenomenon more realistically. The following sections of this Chapter will move from the general to the specific. It will begin with a discussion of the problem of politics in international legal discourse and how values influence and motivate the development or evolution of contemporary international legal orders. The final section will describe the policy-orientated jurisprudence of the New Haven school and how such a theory about law is well suited for the integration of empirically measurable value knowledge in legal understanding.

2. WHY VALUES MATTER IN INTERNATIONAL LAW

What a society or community values is an integral component of all legal theory, both domestic and international. Whether or not one is persuaded by the explanatory power of political realism or legal idealism, both theories are pursued for the reason that their expositors value them. Political realism values power and the pursuit of subjective self-interest to the exclusion of all other values. Legal idealism, on the other hand, values the perceived order and stability that such a legal understanding promotes. Values of all types are embedded in every type of legal theory, and because of that, it is critical that value knowledge is pursued from a perspective of nonskepticism. Subjective value knowledge is possible, if not always practicable. As noted in the previous Chapter, even the most descriptive accounts of analytical jurisprudence require some level of evaluation to make their theory work.²²

The example of how customary international law is formed provides a good illustration of this hybrid descriptive-evaluative nature of legal knowledge. The statutory claim is that noncodified custom must contain two distinct elements in order to form the corpus of custom in international law.²³ These two elements are an objective one called state practice, and a subjective one called *opinio juris*. In order to constitute custom, both elements must be present. The difficulty for devotees of the idea of custom is how to establish the subjective element in a world that claims that knowing subjectivity is difficult,

Free Society: Studies in Law, Science, and Policy. Volume I & II. New Haven, New Haven Press, p. 16.

²² See Chapter 3, Section 3.1.2.

²³ Martin Dixon (2007). *Textbook on International Law*. Oxford, OUP, p. 31.

if not impossible, to obtain. Some scholars address this problem by holding that *opinio juris* can be inferred from state practice.²⁴ That is, if a state can be said to objectively endorse a customary rule or practice (by actually doing it – something akin to Hartian social fact), and that this rule is identifiable as requiring a state to act in particular way (through statements confirming such an obligation), then the subjective element can be inferred.²⁵

However, it is the subjective endorsement (so-called rule acceptance) of the sense of legal obligation (*opinio juris*) that is a component of legalness, and it is different than the identification of practice. In this way, the idea of *opinio juris* has many parallels to the Hartian notion of the ‘internal point of view.’ For a rule to be obligatory, the practice (social fact) must not only be identified as emanating from an authoritative source, it must also be accepted as binding by those officials seen to be in the position of verifying the legality of a particular practice. However, the problem is that knowledge about whether a state²⁶ has accepted an obligation as legally binding is not always capable of analytic description.²⁷

From a positive perspective, the obligatory nature of a rule of custom can be identified by claiming that the pedigree or source of a particular legal rule is sufficient to mandate legality. By focusing on the authority of a rule (where it emanates from), most legal theories have little trouble in deriving the legality of a rule from its authoritativeness. While considerably simple in practice at the municipal level, the identification of policy content, authority signal, and

²⁴ See José Alvarez (2009). *A Bit on Custom*. New York University Journal of International Law & Politics. Vol. 42, pp. 17, 59.

²⁵ Some scholars believe that if such statements can be identified, there is nothing to infer. In other words, the *opinio juris* has been met. Such a descriptive approach works in the majority of cases, but it cannot explain where a state may have an obligation that it has internalized but that internalization has not been made empirically observable through actual behaviors.

²⁶ Another problem with the identification of whether the ‘official’ has accepted a rule as binding relates to the fiction about the state as a unitary entity that thinks and believes. As Reisman has pointed out, there is considerable difficulty in figuring out what the ‘state’ thinks. A state is not an entity that thinks; rather it is a collective of individuals who change over time. Furthermore, even if the ‘state’ can be disaggregated into the thought processes of individual actors, it is often difficult to get to these often inaccessible or hostile elites. “Verifying *opinio juris* as autonomous subjectivity requires the cooperation of often inaccessible or hostile elites who are unlikely to submit to depth interviews.” Michael Reisman (1981). *International Lawmaking: A Process of Communication*. American Society of International Law Proceedings, Vol. 71, pp. 101, 105. However, while empirical verification of these subjectivities is difficult, it is the claim of this work that such knowledge is possible, and that Q methodology may contribute to knowledge of such subjectivities.

²⁷ This makes it difficult to empirically verify as social fact. Sometime it can be verified as social fact by actual behaviors that are announced through statements, but just as often, the sense of obligation that state officials hold in regard to a particular rule or legal order are internal to their constitution and do not present as observable behavior. For some, it is statements about the belief that a rule is obligatory, and not the actual belief that constitutes *opinio juris*. See Anthony D’Amato (1971). *The Concept of Custom in International Law*. Ithaca, Cornell University Press, p. 49.

control intent²⁸ at the international level is quite a bit more difficult. Subjective knowledge about the bindingness (intent to be bound) of a particular law is often difficult to know objectively (that is, as an external manifestation of the internal intent to be bound).²⁹ Therefore, at least in the context of identifying international law, the subjective aspects of rule acceptance should be the focus of more attention, not less. In other words, where there is no clear authority (such as a legislature) that can prescribe binding obligations on its subject (states), the subjective understanding of when a rule is accepted as obligatory by a state becomes central to an understanding of legality.³⁰

The reason for claiming this is psychologically and philosophically apt: in the absence of a centralized authority, the legitimacy of a rulemaker or ruleapplier is measured not in the identification of a pedigree or source, but in a determination of whether or not a particular rule or law has been promulgated in a manner that its promulgator considers to be binding. However, in the international context, it is not a nonreciprocal situation where the lawgiver alone must internalize the practice as binding. In most situations, given the legal equality of states, the lawgiver is also the lawtaker (that is, the state is both the promulgator and the subject of the law). This is something that features prominently in Fuller's theory (that is, that the law is best understood as a reciprocal relationship between officials and citizens),³¹ and is something that Hart's theory does not consider.

²⁸ Collectively, these three components must be present in constituting legality. These terms come from Michael Reisman. All three components must be present *and working* for a law to be considered binding and obligatory. See Reisman, *supra* note 26 at p. 101.

²⁹ Michael Reisman and Mahnoush Arsanjani have expressed concern – albeit in the context of treaty interpretation – about the difficulty of knowing intent (subjectivities) with anything less than such external manifestations. Without a means for measuring and knowing these subjective aspects objectively, his advice seems profoundly reasonable. “The very notion of the ‘subjective’ views of a state involves a personification of a complex social organization to a degree that would make Hegel himself blush; even if the personified state is reduced to a key person, decision makers are always changing. In multilateral treaties, the quest for the ‘shared’ subjectivities of the many states that are involved in any place other than the text of the agreement is a pursuit of the *ignis fatuus*.” Mahnoush Arsanjani & Michael Reisman (2010). *Interpreting Treaties for the Benefit of Third Parties*. American Journal of International Law. Vol. 104, pp. 597, 602. However, from a theoretical angle, one may ask whether knowing subjective intent as an empirically observable phenomenon is possible through the use of Q methodology. On the specific difficulties related to the use of Q methodology in this regard, see Andrew Willard (1994). *The Scientific Study of Subjectivity and the Achievement of Human Rights*. Operant Subjectivity. Vol. 17, p. 1.

³⁰ As has been stated, under normal conditions the bindingness of a social fact is relatively easy to determine. One can look to the practice (or absence of a practice) of a particular rule and determine if that rule has been accepted as obligatory by those to which it is subjected. For the hard cases, such as the ones that Ronald Dworkin has identified in the municipal context, knowledge about the source and practice of a particular rule is not sufficient to determine if a rule is obligatory. It often requires reference to a value and a process of reason and evaluation in order to understand its bindingness. Such hard cases are more frequent at the international level, and because of this, international law often demands reference to value and the processes of evaluation in determining if a rule contains the elements of legality.

³¹ See Chapter 3, Section 3.2.2.1.

International lawmaking highlights this feature in conceptual theorizing. As both the lawtaker and lawgiver, the internalization of a rule must be evaluated from both perspectives. Therefore, the bindingness of a rule is not as easy as looking to see if an ‘official’ views the rule as binding from the ‘internal point of view.’ Instead it means that the perceived legitimacy of a law must also be considered; and this requires evaluation when accessed from the standpoint of the legal decisionmaker (the lawmaker who considers a law or rule to be binding on its subjects), the lawtaker (the subject of the rule), and the legal commentator or scholar (the discourser who is assessing whether or not the lawgiver or lawtaker ought to be bound by a particular rule). This exposes two issues with the identification of custom: 1) it cannot be purely described, and 2) that the evaluation of whether a rule is binding cannot be done in isolation from the social context (in this case, the relations between states).

Such a claim is very subjective in nature, but that is exactly the point. Without a clear hierarchical source signaling the obligatory nature of a particular legal order, the acceptance of law must be derived from the subjective viewpoint: that is, it must reflect an endorsement (intent to be bound) of the underlying value claims that a particular international community or state seeks to achieve. While relatively clear in theoretical terms, the practice of such a claim is of course a messy and often convoluted enterprise. However, the subsequent sections of this Chapter will attempt to show that this approach to international legal understanding has actually received some traction in recent decades, especially in the context of theories that understand the law as an ongoing process of social interaction and choice.

2.1 The Politics of International Law

Throughout most of the history of international law, legal theory has oscillated between natural law (nonpositivist) theories and legal positivist theories (conceptually), and political realism and legal idealism theories (politically). On the positivist side, international law is based in state consent. The concept of external sovereign autonomy and equality demands that each state must consent (whether they do so willingly or not is another question) to international legal rules. Absent such consent, legal rules lack their bindingness. This is problematic for a variety of reasons, but fundamentally, such a concept of consent only includes rules to which a state posits and consents. Such a theory will sometimes fail to explain how general principles

of law or morality are consented to,³² and it can also fail to explain how nonconsensual norms and rules can ever be binding on states.³³

For natural law (forms of conceptual nonpositivism) theories about international law, similar problems present, but for different reasons. Under such theories, nonposited norms can trump treaty- and consent-based norms in some cases.³⁴ However, with the exception of some theories about international legal constitutionalization,³⁵ international law lacks any centralized hierarchy for categorizing such nonposited norms. In practice, this means that general principles can be invoked to supersede principles that states have consented to in agreements or treaties. Absent a clear means for understanding the relationship between consent and nonconsent among legal principles in international law, legal positivists hold that only confusion will result.

However, this confusion and uncertainty may be overstated. In most cases, principles and norms are discussed in international legal decisions, they are explicitly embedded in treaties, or they are analyzed by publicists through written legal discourse.³⁶ This means that a determination of whether a principle or norm is applicable in a particular context will be determinable by reference to the traditional sources of international law alone. Where problems arise is in the determination of whether an emerging principle ought to be binding on nonconsenting parties (states), or in cases where it is unclear which multisourced equivalent norm should apply in a particular situation.³⁷

Problems also arise under a consent-based understanding of international law when viewed in the context of international political realities and power imbalances. Politics and power are a vital component in any understanding of international law and will have influencing factors on the way that both positivist and nonpositivist conceptual theories about law are approached. While positivist and nonpositivist theories about law concern the identification of legality, political theories about law at the international level are concerned with the balance of power in the making and applying of international law. In other words, they are not concerned with a conceptual understanding of what is and is not law; rather the focus of political theories about international are

³² In the context of adjudication, this is Dworkin's claim about the inadequacies of Hartian legal positivism. See Chapter 3, Section 3.2.1.1.

³³ See Laurence Helfer (2008). *Nonconsensual International Lawmaking*. University of Illinois Law Review. Vol. 2008, p. 71.

³⁴ These include jus cogens norms and other general principles of international law.

³⁵ See Mattias Kumm (2004). *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*. European Journal of International Law. Vol. 15, p. 907; Jan Klabbbers, et al. (2009). *The Constitutionalization of International Law*. Oxford, OUP.

³⁶ In practical terms, these are all sources of valid law according to Article 38 of the International Court of Justice (ICJ) Statute. *Statute of the International Court of Justice (ICJ Statute)*. 26 June 1945, 59 Statute 1055.

³⁷ Multisource equivalent norms are those norms or principles that are equally applicable and equally authoritative in a particular legal context.

concerned with how the phenomenon of international works in the context of international politics, if at all.

These theories fluctuate between political realism and legal idealism. Most nonlegal political realist theories are skeptical about the ability of law to constrain state behavior. Legal idealist theories about international law, on the other hand, also believe that law must understood in the context of international politics and power, but they hold that law and legality contain their own autonomous powers in constraining state behavior (that is, they are not international law skeptics).

According to most theories of political realism, and more modest versions which include those such as rational institutionalism,³⁸ the law only guides the conduct of states so far as it assists that state in the promotion of its own self-interest maximization.³⁹ Such theories do not negate the reality that values influence and shape state demands, identities, and expectations (perspectives); rather, they claim that the achievement of these goals is not contingent on an international rule of law.⁴⁰ Various forms of legal idealism, which are often conjoined with theories of constructivism in both international law and in international relations literature,⁴¹ on the other hand, are more nuanced. They hold that international legal structures have the ability to influence and constrain state behavior even in the face of naked power. They claim that interests, identities, and expectations (perspectives) are constructed, and that states reflect these perspectives in the laws to which they consent. In this way, the law is an integral part of state identity, and that achievement of state interests can be assisted by an international rule of law.⁴²

What is critical to such a distinction between political realism and legal idealism is the influence of politics on international law. This is not intended to discount the importance of the political and legal complexities at the domestic level, but rather it is an attempt to distinguish the two because of the structural differences arising out of the concept of sovereignty. From within sovereignty, the relationship between politics and law lies within a well-

³⁸ See Kenneth Abbott (2008). *Enriching Rational Choice Institutionalism for the Study of International Law*. University of Illinois Law Review. Vol. 2008, p. 5.

³⁹ For the exposition of a theory of political (neo)realism in the international relations context, see Kenneth Waltz (1979). *Theory of International Politics*. New York, McGraw Hill.

⁴⁰ Richard Steinberg & Jonathan Zasloff (2006). *Power and International Law*. American Journal of International Law. Vol. 100, pp. 64, 82.

⁴¹ Constructive theories in international relations hold that state identities are not static, but that they are given their form by ongoing processes of social practice and interaction. These political theories are more optimistic about the ability of the law to assist in constructing these state identities. So, while international relations constructivism is not concerned specifically about the authority of law to constrain state behavior, they believe that the structure of international politics allows for 'real' law to develop. On the idea of social constructivism in international relations, see Alexander Wendt (1992). *Anarchy is What States Make of It: the Social Construction of Power Politics*. International Organizations. Vol. 46, p. 391.

⁴² Steinberg & Zasloff, *supra* note 40 at pp. 71-76.

developed discourse on the rule of law. Sovereign states can be said to have a weak or strong rule of law according to how well political subjectivity is sheered away from legal objectivity.

From outwith sovereignty, the relationship between politics and law lies not in the weakness or strength of legality, but in the role that legal objectivity can play in limiting the influence of political subjectivity. This is what is ultimately meant, and nothing more, in claiming the theoretical differences between political realism and legal idealism in this context. All international law contains elements of political subjectivity: the difference in theoretical understandings merely refers to the relative amount of political subjectivity that a theory will tolerate in understanding how international law works in the context of international relations.

From inside sovereignty, the division between law and politics is more or less articulated, and the discourse thus focuses on the degree to which the two are separated (in its strongest form would be to claim that ‘no one is above the law’). From outside sovereignty, the structure of sovereign autonomy means that the discourse is less sophisticated: its focus pertains to whether or not an international rule of law can constrain politics at all. Visions of a legally ideal rule of law at the international level have been contemplated in the past, but have always been hampered to some extent by ‘political realities.’⁴³ In many ways, the skepticism about the ability of international law to function independent of politics continues to be based on a – likely false – distinction between what can count as law inside sovereignty and what can count as law outside of sovereignty. It is this distinction about the role of politics in international affairs that continues to exert influence on the way that theoretical approaches to international law are conceived.

The important question in the context of this work is whether one’s theory advances a concept of international relations that advocates the advancement of values from a political or legal perspective. International theories about law tend to focus on whether or not politics or law is best suited at the international level to advance commonly held values; not whether or not subjective values expectations can be exclusively captured within an objectively applicable rule of law. Taken one step further, it is the goal of this work on value subjectivity to articulate how the worldviews and perspectives of legal decisionmakers and discourses affect the way that legal orders develop. However, this is not to say that political decisionmakers are any less influenced by value subjectivity in the way that political problems are approached. From an international perspective, the question is whether these subjective thought processes can be distilled in a *legally* meaningful manner.

⁴³ See generally Martti Koskenniemi (2001). *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Cambridge, CUP.

This section attempted to show that regardless of theoretical orientation at the international level, value perspectives play a crucial role in both international politics and in international law, and often such political and legal subjectivities may in fact be more intertwined than in the domestic context. Furthermore, the problem of external sovereign autonomy reduces the likelihood of an objective rule of law developing that is analogous to one within sovereignty. Therefore, the claim being advanced is that a focus on subjective knowledge – whether enshrined in political or legal choice – at the international level is critical to a realistic understanding of interests and expectations that exist from without sovereign states.

2.2 Koskenniemi's Critique

In an effort to further distill the relationship between law and politics at the international level, and how the gulf between political realism and legal idealism might be bridged, it is useful to look at the structure of the international legal argument from the perspective of Martti Koskenniemi. Koskenniemi is a proponent of what can be described as new stream scholarship in international law as pioneered by David Kennedy.⁴⁴ This move in the history of international legal thought is yet another example of domestic legal theory being applied to international legal theory. Both Kennedy and Koskenniemi are considered scholars of a movement called critical legal studies: a legal methodology whereby the structure of the law is analyzed and dissected in a manner that is generally critical of the claims that traditional legal scholars advance.

In his influential monograph, *From Apology to Utopia*,⁴⁵ Koskenniemi puts forth the argument that international law oscillates between the need to verify law's content by reference to concrete behavior, will, and interest of states (concreteness)⁴⁶ and the need of impartial ascertainment and application of law regardless of the behavior, will, or interest of states (normativity).⁴⁷ He claims that international law oscillates between law as an apology for state behavior and law as a utopian vision of an autonomous legal order applicable to states regardless of interests. This, he argues, creates a structural flaw that

⁴⁴ David Kennedy (1988). *A New Stream of International Law Scholarship*. Wisconsin International Law Journal. Vol. 7, p. 1.

⁴⁵ Martti Koskenniemi (2006). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge, CUP.

⁴⁶ "The requirement of concreteness results from the liberal principle of the subjectivity of value. To avoid political subjectivism and illegitimate constraint, we must base law on something concrete – on the actual (verifiable) behaviour, will and interest of the members of society-states." Martti Koskenniemi (1990). *The Politics of International Law*. European Journal of International Law. Vol. 1, pp. 4, 7.

⁴⁷ "According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself." Id.

makes the description and evaluation of an objective rule of international law impossible to formulate.⁴⁸

In terms of theoretical outlook, and if Koskenniemi's account is correct, then neither legal idealism (autonomous law) nor political realism (state behavior) can ever provide an accurate and objective account of international law. Inherent in this argument is the idea that values (normativity) are subjective and that therefore they are incapable of ever being objectively verified. According to this view, which is premised on the demand that international law must be able to achieve legal objectivity and that all international law must reflect state will or consent, international rules cannot be simultaneously be concrete and normative. Koskenniemi claims that these two conditions cancel each other out:

[a]n argument about concreteness is an argument about the closeness of a particular rule, principle, or doctrine to state practice. But the closer to state practice an argument is, the less normative and more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rules' distance from state will and practice. The more normative the rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.⁴⁹

This insight from Koskenniemi provides two options for international legal theory: either to abandon the possibility of objective knowledge about normative international law from ever being attainable, or to chart a path that claims that there is indeed some objective knowledge about values that is possible: the idea that values and norms can be objectively identified and therefore can be pursued as a component part of legal validity. The main purpose of this work is to advance the possibility of objective value knowledge as shared subjectivity; and to determine such a claim through the use of Q methodology. If possible, this objectified (or at least empirically observable) normative knowledge might assist in moving normativity closer to concreteness.

2.3 Evolving Global Legal Orders

Turning now to the way international law evolves or develops, this section will look at how international law is influenced, and to provide a basis for the theoretical orientation that this work pursues.⁵⁰ In the post-war era,

⁴⁸ Id. at p. 8.

⁴⁹ Id.

⁵⁰ This is a focus on how international legal discourse shapes and influences the way that international law evolves and develops over time.

international law and international institutions have proliferated. During this same period, many new international legal orders have come into existence; and since their inauguration, these same legal orders have evolved and transformed in ways that would make their earlier embryotic stages almost unrecognizable.⁵¹ The shift in the development since the mid-twentieth century stems from an increasing interdependence between the global community of states, and an increased globalization of the values that states have internalized and accepted as binding.

An understanding of the how's and why's of international legal development is clarified by bifurcating lawmaking, lawapplying, lawshaping, and lawinfluencing into categories of legal decisionmaking and legal discourse.⁵² Legal decisionmaking refers to the way that authoritative and controlling legal decisions are made and applied by politically relevant actors. Legal discourse refers to the corpus of lawshaping and lawinfluencing debate, discussion, and analysis made by scholars, but also by individuals and institutions (participants) with a stake or interest in advancing international law along particular lines. It is claimed that the legal discourse is an essential feature in shaping the way that states and other relevant actors (decisionmakers) allow for the law to develop.

For value inquiry in the context of law, this distinction between decision and discourse is important because each enterprise is distinct in its goals. The focus of value knowledge for decisionmakers (those who make and apply international law) is based on the way that they internalize value claims into the decisions that they make. The focus of value knowledge among discourses is on how their value claims and demands influence and shape the worldviews and perspectives of legal decisionmakers. A theoretical understanding of how and why international law evolves and develops must be understood in the way that values are distributed and maximized in an ongoing process of social choice. Value claims matter in the context of legal evolution; they are integral to the process of change.

However, this work holds the position that questions about the distribution of value in the context of legal evolution are not, and should not be understood exclusively in the context of how the decisionmaker makes choices. It is claimed that the discourser plays an equally important role in shaping and influencing the evolution of particular legal orders. Under such a claim, then it is important to understand just what the discourser (participant or scholar) holds to be the appropriate distribution of value in a particular context. To understand why and how international legal orders develop or evolve over time, inquiry must focus on how various value claims (political or otherwise) shape and influence the law from the outside.

⁵¹ E.g. the international law on foreign direct investment or international criminal law.

⁵² See Chapter 3, Section 2.3.

In assuming that legal discourse does shape and influence the decisions that legal decisionmakers make, then it might likewise be assumed that perceptions about the law and the value positions that discourses endorse matter in shaping the developmental path that a particular legal order takes. In terms of international legal discourse, the hypothesis is that perceptions matter in how international law evolves; and that this discourse is driven by the way that the law is perceived in addressing the values that comport with one's understanding about how the world ought to be ordered. This manifests as the subjective value positions that legal discourses claim and demand in the way that legal problems are approached.

These subjective value perspectives thus become critical to understanding the reasons and justifications that shape and influence legal conclusions. To test this hypothesis, the main purpose of this work is to establish whether or not insight into the measurement of these subjective perspectives can be known in a manner that promotes their integration in theoretical understandings about how legal orders evolve. The claim is that, if these value perspectives can be identified, then areas of convergence and divergence may likewise be identifiable. Since these underlying value perspectives play such a crucial role in the way that legal problems are approached, advancing knowledge about these subjective states of mind could assist considerably in understanding the role of values in both legal decision and legal discourse.

3. CONTEMPORARY INTERNATIONAL LEGAL THEORY

Before looking at the policy-orientated jurisprudence of the New Haven school, it may be helpful to briefly map and summarize some of the competing international legal theories that have been pursued throughout the last century or so. Trends emerge along three major themes of thought: 1) international legal theory has been greatly influenced by legal theories promulgated for domestic legal understanding and these types of legal theories (both normative and descriptive) can be seen to largely mirror developments in legal thought at the international level, 2) international legal theories have always had difficulty in distinguishing between politics and law, and that even the most positivistic international legal theories are infused with political thought, and 3) international legal theories (at least in the second half of the twentieth century) have been focused primarily on answering the question of why – absent a centralized base of authority and control – states obey international law and norms most of the time. It is these three underlying themes that have most greatly influenced the way that international legal theories have been approached over the past century.

3.1 An International Law of Rules?

At the beginning of the twentieth century, international law was primarily focused on determining the set of rules that regulate the relations of states. This was a shift away from previous international legal scholarship that was largely focused on determining how principles of natural law could justify state behavior.⁵³ However, by the end of the nineteenth century, and largely mirroring the work of positivists in the domestic sphere,⁵⁴ international legal positivism began to challenge what it saw as the ambiguous character of natural law in governing the relationship between states. Important thinkers such as Lassa Oppenheim and Hersch Lauterpacht⁵⁵ saw real importance in the idea of state consent and posited legal doctrine at the international level; and focused their scholarship on the identification of the rules and practices that could be identified as deriving from state consent.⁵⁶

On the other side of the Atlantic, American international legal scholarship was optimistic about the possibility that the law among states could be developed in ways similar to domestic or municipal legal systems. Chief among these architects for a codification of international law, and the peace and security that adherence to such a project would create, was Elihu Root.⁵⁷ He promoted an idealized and positivized vision of an international rule of law that persisted in various forms up until the Second World War.

3.2 The (Political) Realist Attack

The Second World War was a turning point for international legal scholarship with scholars such as Hans Morgenthau, who “launched a broad epistemological, heuristic, and normative attack”⁵⁸ on the legal idealism of the

⁵³ See Hugo Grotius [1625](2012). *De Jure Belli Ac Pacis*, edited by Stephen Neff. Cambridge, CUP. “Hugo Grotius expounded the view that the law of nations was based on natural law, or law grounded in values and morality, rather than consent of states.” Tai-Heng Cheng (2012). *When International Law Works*. Cambridge, CUP, p. 38.

⁵⁴ Particularly influential in this regard are the works of Jeremy Bentham and John Austin.

⁵⁵ Lauterpacht (English) and Oppenheim (German) can be considered exemplars of a class of late nineteenth and early twentieth century international law positivists. See Hersch Lauterpacht [1927](2012). *Private Law Sources and Analogies of International Law*. London, Lawbook Exchange; see also Lassa Oppenheim (1921). *The Future of International Law*. Oxford, Clarendon Press.

⁵⁶ Cheng, *supra* note 53 at pp. 43-44.

⁵⁷ Elihu Root believed in the power of the law to be able to constrain state behavior: an idealist and optimistic view about international law. Law, including international law, was a science and could be divorced from politics. He rejected the idea that international law failed to be law because it could not effectively sanction. He claimed “the difference between municipal law and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and . . . there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law.” Elihu Root (1908). *The Sanction of International Law*. *American Journal of International Law*. Vol. 2, p. 451.

⁵⁸ Steinberg & Zasloff, *supra* note 40 at p. 71.

nineteenth and early twentieth century. He, and others, argued that international legal idealism ignored the observable relationships between power, international law, and state behavior.⁵⁹ He claimed that international law not enjoying compliance at the international level was not law at all. This strain of thought has persisted in a number of forms in international relations scholarship ever since. Broadly labeled political or power realism, this frame of inquiry holds that power, not law, is what matters in governing the relations between states.⁶⁰ While the catalyst for this turn to realism was the perceived inability of an international rule of law in preventing the implosion of Europe for the second time in the span of a few decades, it is not a coincidence that political realism in international relations followed the emergence of legal realism in domestic legal scholarship.

Both political and legal realism, in their most extreme and negative forms, attempt to demonstrate that power and personal preferences often trump the application of neutral principles and norms that have been carefully formulated from explicit community (or state) consent. For many, legal realism was just politics by another means. This discrediting of the authority of the law at the domestic level made for an easy attack in the international sphere as there was already a certain level of skepticism about how effective an international rule of law could be absent a centralized source of authority.

However, both political and legal realism can be credited in identifying a number of characteristics in the realm of international law that are hard to ignore. Political realism identified the importance of power and politics in the making, applying, and enforcing of international law; it is an insight that continues to influence and inform international legal theory. Legal realism on the other hand, identified the importance of the decisionmaker in making, applying, and shaping the law. Law, for most strains of legal realism, was what the judge or adjudicator decided. Arguably this is not always the case, but by shifting the inquiry to what decisionmakers actually do when presented with difficult cases, legal realism has informed a whole host of theoretical outlooks in law that focus on decisionmaking processes more broadly in the context of jurisprudence.

3.3 The Post-War Context

As the event of the Second World War demonstrated, legal theories are not only responding to other competing legal theories, they are responding to

⁵⁹ Hans Morgenthau (1940). *Positivism, Functionalism, and International Law*. American Journal of International Law. Vol. 34, p. 260.

⁶⁰ Such a view was not new in the twentieth century. The role of power in the relations between states has been documented in political thought throughout history: from Thucydides to Machiavelli.

political events as well.⁶¹ The post-war period has seen the effort to rebuild Europe, the decolonization of the global South, the establishment of the United Nations (UN), the collapse of the Soviet Union, and the globalization of trade and investment. These events have all had a significant impact on the way that legal theories are framed and understood. For many, the increased interdependence of states in the post-war period has led to an increased role for the law in the regulation of transboundary activity. This legalization of governance is the result of a variety of factors, but may be heavily reliant on the same motivation that drove the early idealists to put so much faith in the law: absent a centralized global government, the law presents the next best solution for both binding the actions of sovereign states and encouraging cooperation.

3.3.1 The Postmodern Turn

Another marked distinction in the post-war theorizing about international law is in its so-called postmodernism. This postmodernism has presented itself as a deep skepticism about the base values that underlie any theory about law. According to Mary Ellen O'Connell, for example, postmodernists in law "contemplate no metanarrative, no conception of human good to be espoused and ultimately achieved."⁶² In this way, most international legal theories (with the possible exception of the New Haven school) refuse to advance a single theory about international law that is based on a set of universally applicable value claims. Values are plural and relative, and as such, any legal theory must be able to understand and articulate contextual sensitivities in their approach to legal problems. The answer to the postmodern problem has been articulated primarily in theories based on an understanding of how the process of law works in practice.

As noted in the previous Chapter, one of the main responses to the rearticulation of positivism by Hart in the mid-twentieth century was in shifting the focus of legal inquiry from the conceptual to the practical.⁶³ However, by the time that Hart was developing his analytic jurisprudence, the only options for a practical approach to legal understanding was that of legal realism. Seeking a more 'realistic' and practical approach to legal understanding, but at the same time dissatisfied with the analytic tools and adjudicative focus of the legal realists, legal process scholars worked to delimit

⁶¹ For a general theory on the role of incidents in the development of international law, see Michael Reisman & Andrew Willard, eds. (1988). *International Incidents: The Law that Counts in World Politics*. Princeton, Princeton University Press.

⁶² Mary Ellen O'Connell (2008). *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*. Oxford, OUP, p. 92.

⁶³ This is a claim that the conceptual project of the positivists could not fully articulate how the law operates in practice, and that a better jurisprudence was one that could articulate how the legal process works.

a theoretical frame for international law based on an understanding of how the process of lawmaking and lawapplying shapes and influences the way that laws develop. This postmodern turn towards process has spawned a large literature over the past number of decades and remains the most advanced response to the various forms of political realism (rule skepticism in international law).

These process-based approaches to international law hold that, as shared values coalesce around legal principles that are enshrined as law properly so called, international law can provide a means of achieving a minimum level (at least) of world order.⁶⁴ While different types of process-based theories of international law differ in understanding the way that such world order can be achieved, they all implicitly carry a certain level of optimism about the idea of international law.

3.3.2 The Influence From International Relations

Before moving to the process-based approaches to international law that have dominated in one form or another since the Second World War, a brief look at its main theoretical competition is warranted. These are the rational choice theories and the various international relations approaches to international law. International relations theory, beginning in the 1970s developed along four major lines: neorealism (structuralism),⁶⁵ institutionalism (functionalism),⁶⁶ neoliberalism,⁶⁷ and constructivism.⁶⁸ These ‘isms’ are identifiable in the works of important thinkers in twentieth century international relations theory, and they paved the way for both rational choice theories and IR-IL (international relations and international law) theories in the late twentieth century.

These international relations theorists, not explicitly concerned with legal theorizing, began to develop ideas about how law was reflected in the state behavior and in the international institutions that states created. The neorealists and the institutionalists generally hold that state behavior could be explained by rational self-interest; and that in the pursuit of self-interest, legal

⁶⁴ Myres McDougal & Florentino Feliciano (1961). *Law and Minimum World Public Order: The Legal Regulation of International Coercion*. New Haven, Yale University Press.

⁶⁵ See Waltz, *supra* note 39 (neorealism).

⁶⁶ See Stephen Krasner (1999). *Sovereignty: Organized Hypocrisy*. Princeton, Princeton University Press (regime theory).

⁶⁷ See Joseph Nye & Robert Keohane (1977). *Power and Interdependence: World Politics in Transition*. Boston, Little Brown (neoliberalism); see also Robert Keohane (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press (neoliberalism).

⁶⁸ See Friedrich Kratochwil (1991). *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge, CUP (constructivism); see also Wendt, *supra* note 41 (constructivism).

rules reflected the underlying power dynamics between states. In other words, the law is a useful tool in the advancement of self-interest. In this way, international law could be mistakenly seen as guiding behavior because it appeared that rules were being consented to by states, but in actuality, the legal rules merely reflected the preferences of the more powerful state.⁶⁹ The neoliberalists and the constructivists, on the other hand, reject the political realist critique as being too focused on power, and instead held that there are situations where the law can facilitate legitimate cooperation between states, even in cases where a powerful state could use its relative power to deviate from such a legal rule.⁷⁰

Beginning in the 1990s, international legal scholars began to adapt these political theories into legal theories.⁷¹ These rational choice and IR-IL theories generally look at the ways that international legal orders can facilitate cooperation between states and when they cannot. Rational choice theories, for the most part, take a limited view of the power of international law to bind states in the face of naked power.⁷² In focusing on state interest as the prime mover in explaining the decisionmaking choices that states make, rational choice theories hold that international law matters, but only when it can be used to justify the political choices that states make. They claim that international law has a very limited capacity to bind states when such a constraint would be detrimental to a state's interest. Liberalist⁷³ and constructivist⁷⁴ theories of IR-IL, on the other hand, are more optimistic about the use of international law by states. However, they hold that any understanding of international law must be seen in the context of state to state relations. This means that there will always be a political power component in understanding when and how international law works.

3.4 Process-Based Approaches

As stated in the previous sections, the major shift in international legal theorizing over the past half century is attributable to the idea of looking at law as process.⁷⁵ This shift towards process has its beginnings in the 1940s

⁶⁹ Jack Goldsmith & Eric Posner (2006). *The Limits of International Law*. Oxford, OUP, pp. 36-37, 118, 225.

⁷⁰ Steinberg & Zasloff, *supra* note 40 at p. 76.

⁷¹ Kenneth Abbott (1989). *Modern International Relations Theory: A Prospectus for International Lawyers*. Yale Journal of International Law. Vol. 14, p. 335; Andrew Guzmán (2010) *How International Law Works: A Rational Choice Theory*. Oxford, OUP.

⁷² Eric Posner (2009). *The Perils of Global Legalism*. Chicago, University of Chicago Press; Goldsmith & Posner, *supra* note 69.

⁷³ Anne-Marie Slaughter (2005). *A New World Order*. Princeton, Princeton University Press.

⁷⁴ John Ruggie (1998). *Constructing the World Polity: Essays on International Institutionalisation*. London, Routledge.

⁷⁵ As David Kennedy notes, "[t]he single most important aspect of contemporary public international law seems to be its preoccupation – doctrinally, institutionally and

when Harold Lasswell and Myres McDougal set out to change the way that legal education was pursued.⁷⁶ The original frame of inquiry, which would come to be known as the New Haven school, was to react, and provide a sound alternative, to the pessimism of realism – both politically and legally. If power and interests shape the law, then any international legal theory must be able to tell decisionmakers what value choices they ought to make. They wanted to articulate how the law could advance the promotion of human dignity and secure a minimum world order.⁷⁷ This, they claimed, could only be achieved if (moral and political) values matter. According to this view, theorizing about law was a normative enterprise where the law was defined as an ongoing process of authoritative and controlling decision by politically relevant actors who shape and secure community demands and expectations about value. This was their main answer to legal and political realism: it offered an potential utility for the law as a means of promoting policies in the pursuit of a world order of human dignity.

However, near the same time that Lasswell and McDougal (and Michael Reisman) were developing their theoretical outlook, a number of other theorists also sought new explanations for when and how international law works. Drawing on, and attempting to adapt, the domestic work of the legal process school,⁷⁸ an international legal process school developed. In 1968, Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld published a textbook for approaching this international legal process.⁷⁹ They focused on the role of the law in coordinating and promoting institutional legitimacy at the international level. By looking at the instrumental role of law in achieving the goal of organizing and regulating human (and state) behavior around shared values, they believed that the law could be objectively known and applied. They wanted to show, that despite the insights of the legal realists, law could be determined and applied autonomously without reference to power. In some ways, the legal process school was about bridging the divide between realism and formalism in adjudication.

However, in claiming that the early process-based approaches did not deal sufficiently with the issue of compliance and enforcement in international law,⁸⁰ scholars such as Louis Henkin and Oscar Schachter⁸¹ wanted to shift

methodologically – with process, and in particular with a process which might convince us of international law's being by imagining it in relationship to something else – often thought of as 'political authority.'" Kennedy, *supra* note 44 at p. 2.

⁷⁶ Harold Lasswell & Myres McDougal (1943). *Legal Education and Public Policy: Professional Training in the Public Interest*. Yale Law Journal. Vol. 52, p. 203.

⁷⁷ Michael Reisman & Burns Weston, eds. (1976). *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal*. New York, Free Press.

⁷⁸ Henry Hart & Albert Sacks (1958). *The Legal Process: Basic Problems in the Making and Application of Law*, Rochester, Foundation Press.

⁷⁹ Abram Chayes, Thomas Ehrlich, & Andreas Lowenfeld (1968). *International Legal Process: Materials for an Introductory Course*. Boston, Little Brown.

⁸⁰ The legal process school developed in the context of domestic institutional structures, specifically in the US, where the issue of law compliance and enforcement was fairly well

the focus to when international can constrain state behavior. While Henkin and Schachter are not easily categorizable in terms of the positivist-nonpositivist or idealist-realist distinction, they both sought to explain international law as real law. Louis Henkin famously stated in his book *How Nations Behave*,⁸² that “almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.”⁸³ Although challenged on many fronts, this statement marked a shift in the scholarship: from does international law matter to how does international law matter?

Towards the turn of the twenty-first century, a whole host of international legal theories broadly describable as process-based were published. Some of these theoretical frames came from late career scholars such as Abraham and Antonia Chayes, Thomas Franck, Michael Reisman, and Rosalyn Higgins; while a younger generation of international legal scholars, such as Harold Koh and Anne-Marie Slaughter,⁸⁴ sought new approaches to how the process of international law shapes and obliges its subjects.

3.4.1 Abram and Antonia Chayes and Thomas Franck

The Chayes’s used the international legal process approach to explain how international regulatory agreements could gain compliance without sanction.⁸⁵ Their so-called managerial approach described how international agreements are made more efficient and effective when the state parties are engaged in an active and reciprocal dialogue and discourse about the regime norms to which they have agreed.⁸⁶ This ongoing process of active management through processes of transparency, verification, and review would result in international rules that would be complied with even absent an effective mechanism for sanctions.⁸⁷

articulated and was not the focus of their inquiry. This presented problems for the international process school in translating a domestic theory into an international theory. Critics claimed that any international legal theory must be explained in terms of the way that international law controls (compliance). They held that the international legal process theory did not address these issues sufficiently.

⁸¹ Oscar Schachter (1968). *Towards a Theory of International Obligation*. Virginia Journal of International Law. Vol. 8, p. 300; Oscar Schachter (1991). *International Law in Theory and Practice*. Boston, Brill.

⁸² Louis Henkin (1980). *How Nations Behave: Law and Foreign Policy, Second Edition*. New York, Columbia University Press.

⁸³ Id. at p. 47.

⁸⁴ See generally Cheng, *supra* note 53 at pp. 51-56.

⁸⁵ Abram Chayes & Antonia Chayes (1998). *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, Harvard University Press.

⁸⁶ Id. at pp. 109-111.

⁸⁷ Harold Koh (1997). *Why Do Nations Obey International Law?* Yale Law Journal. Vol. 106, pp. 2599, 2637.

Thomas Franck on the other hand took a more philosophical approach to the issue of effectiveness of, and compliance with, international rules and norms.⁸⁸ Rooting his theory of international law in a concept of 'right process' and a Rawlsian conception of distributive fairness, Franck proposed that the more legitimate and fair the system of international law was, the more likely that it would be able to exert a 'compliance pull' on its subjects.⁸⁹ He claimed that parties who perceive a rule of norm as established by a legitimate and fair process are more likely to comply with that rule or norm even if the substantive outcome of such compliance would be against the interest of that party. Since there is no centralized and authoritative source of legal legitimacy at the international level, the legitimacy of norms and rules (and the institutions and states that create them) must be rooted in the fairness and justness of those norms.⁹⁰

3.4.2 Michael Reisman and Rosalyn Higgins

Both Michael Reisman and Rosalyn Higgins are process scholars in the tradition of the New Haven school. Michael Reisman – who was an original colleague of Harold Lasswell and Myres McDougal, has added fundamental insight about policy-orientated jurisprudence through a prolific body of scholarship that has spanned nearly fifty years.⁹¹ New Haven scholars, such as Reisman, see law not as a system of rules, but:

as a process of decision achieved through a constant stream of communications among international decisionmakers issuing demands [to values] backed by authority and control.⁹²

Michael Reisman has developed the New Haven school into a theoretical frame that is best understood in its own light. In the 1980s, he built on the New Haven school through his own theory about law as a process of communication:

[p]ut in simplest terms, lawmaking or the prescribing of policy as authoritative for a community is a process of communication. All groups are, perforce, communications networks. An indispensable part of the political processes of groups is communication. An ineluctable effect of all communication is political. Like any other communication process, prescription involves the mediation of subjectivities from a communicator to an audience and, in successful cases, a reception and incorporation by the intended audience, resulting in a set of appropriate expectations that are supposed to influence behavior and, contingently, to alert community enforcement responses when deviations

⁸⁸ Thomas Franck (1995). *Fairness in International Law and Institutions*. Oxford, OUP.

⁸⁹ Thomas Franck (1990). *The Power of Legitimacy Among Nations*. Oxford, OUP, pp. 44-46.

⁹⁰ Koh, *supra* note 87 at p. 2642.

⁹¹ Cheng, *supra* note 53 at pp. 51-52.

⁹² *Id.* at p. 49.

are deemed to threaten public order. All this, of course, is obvious. The problem is how to think about it in a way that facilitates understanding and management.⁹³

Through a jurisprudential orientation that is rooted in a policy-orientated or configurative approach, Reisman's outlook – while very much a part of the New Haven school tradition⁹⁴ – has been labeled by some of his peers as a realistic idealism.⁹⁵ This realistic idealism is captured in an influential article that he wrote over thirty years ago titled, *Myth System and Operational Code*.⁹⁶ In that article, Reisman distinguishes between systems of law that present the official picture (myth systems), but that may not be utilized in practice; and the unofficial, but nonetheless effective, guidelines or codes that are consistent with actual behavior (operational code):

[w]here myth [idealized systems of legal norms] and code [the real behavior actually practiced] coincided with each other and with relevant values, the New Haven School recommended fidelity to rules . . . Where myth and code deviated, however, it was necessary for a lawyer to consider both and to offer guidance on the normative implications of any decision so that good decisions could be made.⁹⁷

Rosalyn Higgins, the first woman president of the International Court of Justice (ICJ), and a devotee of the New Haven school, published a book titled *Problems and Processes*⁹⁸ whereby she sought to refine and clarify the New Haven school's approach to international law. Like Reisman and other New Haven colleagues, Higgins holds that international law is not a system of rules, but a normative system produced and maintained through an ongoing process of decision: "for law as a process of decisionmaking, this is enough."⁹⁹ Defending against the criticism that the New Haven school conflates law with politics,¹⁰⁰ Higgins claims that policy considerations are integral to the process of lawmaking and lawapplying, but that policy choices are prearticulated and not applied *ex post facto*.¹⁰¹ In this way, policy choices can often be distinguished from political choices.

⁹³ Reisman, *supra* note 26 at p. 105.

⁹⁴ Harold Koh (2009). *Michael Reisman, Dean of the New Haven School of International Law*. Yale Journal of International Law. Vol. 34, p. 501.

⁹⁵ Sloane, *supra* note 3 at p. 518.

⁹⁶ Michael Reisman (1977). *Myth System and Operational Code*. Yale Studies of World Public Order. Vol. 3, p. 229.

⁹⁷ Cheng, *supra* note 53 at p. 51.

⁹⁸ Rosalyn Higgins (1995). *Problems and Processes: International Law and How We Use It*. Oxford, Clarendon Press.

⁹⁹ *Id.* at p. 16.

¹⁰⁰ See Bruno Simma & Andreas Paulus (1999). *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*. American Journal of International Law. Vol. 92, p. 302.

¹⁰¹ Rosalyn Higgins (2009). *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*. Oxford, OUP, p. 18.

3.4.3 Harold Koh and Anne-Marie Slaughter

Harold Koh and Anne-Marie Slaughter took international legal process in a different direction by focusing on the way that domestic law and domestic legal institutions influence and shape the way that international rules develop. Harold Koh formulated a theory of what he calls transnational legal process.¹⁰² Under such a conceptualization of how and when states comply with and obey international law, he holds that there is a reciprocal process of norm acceptance that flows back and forth between the national and the international; and that states often internalize international legal norms through the entrenchment of these norms by governmental elites in the forms of domestic legislation, court decisions, and policy declarations.¹⁰³

In a similar vein, but incorporating much of the international relations theoretical frame into international legal understanding, Anne-Marie Slaughter developed a network theory for international law rooted in liberal international relations theory.¹⁰⁴ Such a theory claims that the idea of the state in international affairs is not a monolithic entity speaking with a single voice, but rather is a network of domestic and international institutional decisionmaking elites and bureaucrats that shape and influence the development of international law and international legal institutions through the exchange of information.¹⁰⁵ In applying a liberalist international relations theory to international law, Slaughter's theory holds that state preferences, rather than state power and capacity, are the primary motivators of state behavior.¹⁰⁶ As a reaction to political realism, her theory claims that states endorse and promote particular value (moral) preferences even when state power and capacity would allow such value preferences to be ignored.

3.5 Recent Scholarship

In the most recent wave of international legal theory scholarship, scholars such as Mary Ellen O'Connell, Oona Hathaway, Jutta Brunnée, and Tai-Heng Cheng, continue to refine and develop theoretical understandings of how, why, and when international law matters. In Mary Ellen O'Connell's monograph, *The Power and Purpose of International Law*,¹⁰⁷ she writes a pointed critique of the dismissive attitude that power realists such as Jack Goldsmith and Eric

¹⁰² Harold Koh (1996). *Transnational Legal Process*. Nebraska Law Review. Vol. 75, p. 181.

¹⁰³ Id. at p. 184.

¹⁰⁴ Slaughter, *supra* note 73.

¹⁰⁵ This is akin to the idea of epistemic communities in international affairs. See Peter Haas (1992). *Introduction: Epistemic Communities and International Policy Coordination*. International Organizations. Vol. 46, p. 1.

¹⁰⁶ Anne-Marie Slaughter (1995). *International Law in a World of Liberal States*. European Journal of International Law. Vol. 6, pp. 503, 508.

¹⁰⁷ O'Connell, *supra* note 62.

Posner¹⁰⁸ hold towards international law. Her book aims at explaining how international law is real law because it has the power to sanction.¹⁰⁹ In this way, international law is distinguishable from moral or social rules. Such a conceptualization of law provides a modern addendum to early forms of positivism such as that of John Austin: even if law is restricted to that which is backed by sanction, international law still meets the requirement of law properly so called.

In a similar vein, Oona Hathaway and Scott Shapiro have developed a theory on outcasting in international law.¹¹⁰ As a theory aimed at explaining law compliance, outcasting claims that international law is enforceable through sanctions that exclude actors from the benefits of international cooperation if they fail to comply with the rules consented to by the community of states.¹¹¹ The threat of outcasting often compels states to comply with international legal norms. It is the inverse of Franck's theory about the compliance pull of international law. While Franck holds that international law is more likely to gain compliance when it is perceived as fair and legitimate, a theory of outcasting gains a compliance pull by threatening exclusion. What all of these more recent theoretical frames indicate is that international law is entering a phase where its sophistication requires that theories explain not only what is international law, but how and when it works.

Tai-Heng Cheng, in the tradition of the New Haven school and the specific work of his mentor, Michael Reisman, has developed a justificatory theory of international law that appears to pull together many strands of theoretical scholarship on the idea of international law.¹¹² In his monograph, *When International Law Works*,¹¹³ Cheng puts forth a claim that the normative basis of international law demands a fidelity to the moral and ethical expectations that the global community increasingly demands of international decisionmakers. In placing such emphasis on the underlying values to which all legal orders ought to aim, he develops a theory for justifying when international rules and norms can be deviated from:

decisionmakers should explain their reasons for disobedience, so that others can decide if those are good reasons, and shift their expectations of appropriate conduct for the future.¹¹⁴

In another recent attempt to clarify international law, Jutta Brunnée and Stephen Toope have developed what they call an interactional theory of

¹⁰⁸ Goldsmith & Posner, *supra* note 69.

¹⁰⁹ O'Connell, *supra* note 62.

¹¹⁰ Oona Hathaway & Scott Shapiro (2011). *Outcasting: Enforcement in Domestic and International Law*. Yale Law Journal. Vol. 121, p. 252.

¹¹¹ *Id.*

¹¹² Cheng, *supra* note 53.

¹¹³ *Id.*

¹¹⁴ *Id.* at p. 2.

international legal obligation.¹¹⁵ It is a theory that draws heavily on the work of mid-century legal philosopher, Lon Fuller. One of Fuller's primary insights into the legal relationship between lawtakers and lawgivers was that it was not an oneway street: law is not merely that which is promulgated on high by political elites.¹¹⁶ Rather, in a modern state, the law develops through a reciprocal relationship between officials and citizens. According to Fuller, the projection of authority is interactional in that the legitimacy of legal authority comes from the internal acceptance of legal rules by the subjects of the law, not just from the acceptance of rules by legal officials making the law (this was Hart's view).¹¹⁷

An interactional theory of legal obligation places the authority of the law in how that authority is understood by those subjected to it. In the international sphere, the horizontal legal equality of all states and the structure of international relations whereby the state is both the taker and giver of law, an interactional theory on the reciprocal nature of legal obligation is even more important than in the domestic context. Like most of the international legal process theorists and New Haven scholars, an interactional theory of obligation places a great emphasis on the normativity of law and the process of how shared expectations about value are constructed and sustained. The importance of sharing and shaping normative value expectations is a strand that permeates all of these theories. The challenge lies in developing methodologies for describing and evaluating these value systems in an objective manner. All of these theories have to overcome the practical problem of value subjectivity in a way that makes their theory applicable to all participants and subjects in the international system.

4. THE JURISPRUDENCE OF LASSWELL, MCDOUGAL, AND REISMAN

The New Haven school of jurisprudence, which is also known as policy-orientated or configurative jurisprudence, is so called because of its geographical and intellectual locus of Yale university.¹¹⁸ It started as a collaborative effort by two already prominent Yale professors, Harold Lasswell (a political scientist) and Myres McDougal (an international lawyer). Lasswell and McDougal (and later Michael Reisman) identified a problem: all past theoretical frames of inquiry about the law could not adequately explain the interaction between law and politics. To overcome such a problem, they

¹¹⁵ Jutta Brunnée & Stephen Toope (2010). *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge, CUP.

¹¹⁶ Lon Fuller (1969). *The Morality of Law, Revised Edition*. New Haven, Yale University Press, pp. 221, 237, 241.

¹¹⁷ See Chapter 3, Section 3.2.2.1.

¹¹⁸ The term New Haven school was coined by Richard Falk. See Burns Weston, et al. (1985). *McDougal's Jurisprudence: Utility, Influence, Controversy*. American Society of International Law Proceedings. Vol. 79, pp. 266, 277.

wanted to reject the naïve view that there existed a static and autonomous set of rules that – if they could just be written down and identified – could constrain state behavior. At the same time, they also wanted to reject the legal defeatism of the power realist who claimed that state behavior is never constrained by the law. In rejecting this naiveté and defeatism, they saw legal understanding as a process whereby the law could reflect shared expectations and understanding about the values that the world community ought to endorse. They wanted to provide a holistic theory about inquiry into the law that could clarify the law in terms of the purposive ends it seeks to advance and protect: community value goals. To do this, Lasswell, McDougal, and Reisman had to formulate a theoretical understanding of the law that could hover between legal idealism and political realism: a task that was both challenging and innovative.

4.1 The Background

The question that Lasswell, McDougal, and Reisman were concerned with was: whether there was a way, in spite of the defeatism about international law in the immediate post-war period, to configure international legal orders that could more realistically have the capacity to constrain state behavior – something that international law as it was then configured had repeatedly failed to do¹¹⁹ – when faced against the onslaught of naked power? Bridging this divide and recalibrating law so that it could achieve this objective continues to be the lasting legacy of the New Haven school: it is an idea that signified a paradigm shift in the way that international law could be approached, and it continues to be such a common goal of contemporary international legal understanding that is sometimes difficult to see how revolutionary the idea was in the late 1940s.

In the years since, the New Haven school has run the gamut in terms of criticism and commendation.¹²⁰ What began as a hopeful and optimistic vision about the power and purpose of international law in creating a world of peace and security turned into a metaphor for those claiming that Lasswell and McDougal were in fact doing the opposite. Such criticism has continually

¹¹⁹ In his remarks, Reisman states: “I should like to make one point before I address those issues: to suggest for one moment that McDougal has undermined a very stable house of international law is absolutely preposterous. If international law were working as it is supposed to be working, McDougal and his associates would have been among the first to use it in that fashion. The system was not working before World War I, it was not working in the interwar period, it was not working and did not stave off the violence during World War II, and it has hardly minimized the peril of the high expectation of violence since then. The idea that we have iconoclasts here who are taking apart a system that works very well as a logical system of rules is pure fantasy.” Id. at p. 273.

¹²⁰ Hengameh Saberi (2012). *Love It or Hate It, But for the Right Reasons: Pragmatism and the New Haven School’s International Law of Human Dignity*. Boston College International & Comparative Law Review. Vol. 35, pp. 59, 67-68.

claimed that the project of the New Haven school was an apology and justification for the value positions held by proponents of post-war American exceptionalism.¹²¹

In focusing the critiques in this direction, and attempting to discredit the theory on the basis of the negative practical implications of value subjectivity (or the hubris of value objectivity), critics tended to bypass any meaningful insights into the epistemic and methodological value of the theory itself. It has been claimed that the application of the New Haven school conflates law with politics,¹²² that its complicated technique and terminology are impossible to apply to practice,¹²³ that McDougal used the theory to justify US foreign policy preferences,¹²⁴ and that despite its efforts at scientific objectivity the New Haven school's aim at goal values only encouraged subjective (arbitrary and manipulatable) outcomes to legal problems.¹²⁵

All of these critiques seem quite unsophisticated upon close reflection. A more appropriate and responsible approach to a critique of the New Haven school would be to ask whether its nonreductivist and nonpositivist framework of inquiry can provide a realistic image of world public order that can sit between theories that either seek to reduce legal understanding to a formal set of primary rules to which states must be authoritatively bound (legal idealism), or a theories that seek to reduce understanding of international affairs to the political interests and capacities of the powerful (political realism).

For many international scholars, there is a gulf between legal idealism and political realism and that in between these poles is nothing but open space. This means that there is either law (that is, conceived in a positivistic and formalistic manner) or power (that is, conceived of as the absence of objective and binding law when confronted with political power), and that any other way of conceiving the relationship of law and politics is impossible. In general, and not in specific reference to the New Haven school, nonpositivist orientations or frames about the law (although not conceptual natural law theories) hold that there is no void between legal idealism and political realism: international law is in many senses a political enterprise.

¹²¹ Richard Falk (1995). *Casting the Spell: The New Haven School of International Law*. Yale Law Journal. Vol. 104, pp. 1991, 2001.

¹²² Simma & Paulus, *supra* note 101.

¹²³ "Some scholars have tried to mock what they have presented as the daunting complexity of this approach. In fact, much of its intellectual power lies in its comparative simplicity and the extraordinary condensation which its authors achieved. None of the particular tools requires one to remember more than eight terms or to count on more than eight fingers. Perhaps those who have criticized the theory for complexity may find even this beyond their own resources, but they have missed the point by a large margin. Life is complex, and anyone familiar with international political life knows that it is extraordinarily so. NHS [New Haven School] has developed an economical way of comprehending, addressing and devising strategies that seek to change it." Michael Reisman's remarks in Weston, *supra* note 118 at pp. 279-80.

¹²⁴ See Richard Falk's remarks. *Id.* at p. 281.

¹²⁵ See Oscar Schachter's remarks. *Id.* at p. 271.

4.2 Four Foci for a Theory About Law

To achieve their goal for a theory about law that could comprehensively map social choice, Lasswell, McDougal, and Reisman pursued a theoretical frame that was decidedly value-orientated in character. Their approach sought to take legal realism with “its critical focus on the interplay between rules and social processes in the enunciation of law in authoritative form,”¹²⁶ and inject it with Lasswell’s insights from his policy sciences and communications theory, and turn it “into a comprehensive framework of inquiry.”¹²⁷ Under such a conceptualization of law generally, and international law specifically, their idea was that the law can be used as a means for achieving social ends through a nonreductivist, contextual, and problem- and process-orientated understanding that focused on the fundamental (and objectively attainable) values that could produce a world public order of human dignity. Lasswell, McDougal, and Reisman were the first to attempt to conceptualize international law in a way that could overcome the structural argument that Koskenniemi would later identify.¹²⁸ To achieve such a goal, they articulated what can be defined as four fundamental foci upon which their theory about law would be based.

4.2.1 A Focus on Decision

First, the New Haven school would be a theory about law that focused on decision. Deriving from the natural law tradition and brought forward into the modern period primarily by the various legal realist movements of the early twentieth century, the focus on decision allows a framework for inquiry about law that is not framed in terms of obedience to a particular rule, but as a process of making social choices that are relevant for a particular community.¹²⁹ Like the legal realists, the focus of inquiry would be on what decisionmakers actually do.¹³⁰ By shifting the inquiry in this direction, legal understanding becomes less about the identification of a set of rules and more about the process by which choices are made. The New Haven school sought to develop “a functional critique of international law in terms of social ends that shall conceive of the legal order as a process and not a condition.”¹³¹

¹²⁶ Falk, *supra* note 121 at pp. 1991-92.

¹²⁷ *Id.* at p. 1992.

¹²⁸ See Koskenniemi, *supra* note 45.

¹²⁹ Michael Reisman (1992). *A View From the New Haven School of International Law*. American Society of International Law. Vol. 86, pp. 118, 119.

¹³⁰ However, the caveat being that the New Haven school is interested in understanding the broad category of decision, not the narrow category of judicial adjudication, which was the primary focus of the American legal realists.

¹³¹ Roscoe Pound (1932). *Philosophical Theory and International Law*. Bibliotheca Visseriana, Vol. I, pp. 73, 89, quoted in Myres McDougal (1953). *International Law, Power and Policy: A Contemporary Conception*. The Hague, Recueil des Cours. Vol. 82, p. 133.

4.2.2 A Contextual Inquiry

Second, the New Haven school is nonreductivist and contextually orientated. In this way, the theory is a framework for inquiring about the law and not a reductivist account of law as something that meets a set of criteria or conditions. This aspect of the New Haven school sees law as deeply rooted in social context and is attributable to the influence of the Lasswellian policy sciences. Law, under such a frame, is a process of shaping and articulating social choices through a rigorous and scientific approach to decision. This process must be understood in the broader community context:

[l]egal institutions, which are part of the process of value shaping and sharing, must be appraised according to the contributions which they make to value outcomes and institutions. In any community, the legal system is but part of a more inclusive system, the system of public order, which includes a preferred pattern for the distribution of values and a preferred pattern of basic institutions. The appropriate scope of inquiry into any legal system is, therefore, to appraise its significance for the system of public order which it is expected to fulfill and protect . . . In the aggregate, a legal system is to be appraised in terms of the values to be maximized in the total context of public order.¹³²

4.2.3 An Ongoing Process

Third, the New Haven school defines law as an ongoing process of authoritative and controlling decision. Law and decision are not synonymous. If they were, decision would be indistinguishable from naked power. Instead:

only those decisions, i.e., communications with *policy*, or prescriptive, *content*, that are taken from communitywide perspectives of *authority* and backed up by *control intent*, are characterized as law. These are decisions that are made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of authority, with sufficient bases in effective power to secure consequential control, and by authorized procedures [emphasis in original].¹³³

The law, according to such a view, must be both authoritative and controlling in order to meet the requirements of legality. However, the content of the law is also a critical component. According to Reisman:

while much of general communications may; as I have suggested, be relevant to law formation, what is distinctive about prescriptive or lawmaking communications is that rather than transmitting a single message, they carry simultaneously three coordinate communication flows in a fashion akin to the coaxial cables of modern telephonic

¹³² Lasswell & McDougal, *supra* note 21 at pp. 16-17.

¹³³ Siegfried Wiessner & Andrew Willard (1999). *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*. American Journal of International Law. Vol. 93, p. 319.

communications. The three flows may be briefly referred to as the policy content, the authority signal and the control intention. Unless each of these flows is present and effectively mediated to the relevant audience, a prescription does not result. Equally important, even if the three components are initially communicated, they must continue to be communicated for the prescription, as such, to endure; if one or more of the components should cease to be communicated, the prescription undergoes a type of desuetude and is terminated.¹³⁴

According to these definitions, the law is a process of ongoing communication. Law is made by decisions that are both authoritative and controlling. This is a dynamic process, whereby the policy content may change over time in order to reflect the community goals that the law aims to protect. Policy content, in addition to a decision's authority signal and control intent, must be appraised according to its capacity to achieve community goals. Even if authoritative and controlling, decisions must contain content in consonance with the fundamental goals of the international community to obtain their legalness.¹³⁵

4.2.4 Goal and Value Orientated

Fourth, the New Haven school is decidedly goal- and value-orientated. It sees:

the end of law and the criterion for appraisal of particular decisions [in] their degree of contribution to the achievement of a public order of human dignity.¹³⁶

The primary jurisprudential and intellectual tasks of the New Haven school are the prescription and application of policy in ways that maintain community order, and simultaneously achieve the best possible approximation of the community's social goals and values.¹³⁷ This normative commitment is based on what McDougal and Lasswell considered to be a logically exhaustive, but empirically open, set of eight core values.¹³⁸ The values, which are detailed in the next sections, are nonhierarchical and represent categories of things that all human beings want, cherish, or desire. A world public order of human dignity is defined as one which approximates the optimum access by all human beings to these values.

¹³⁴ Reisman, *supra* note 26 at p. 108.

¹³⁵ Michael Reisman (1971). *Nullity and Revision*. New Haven, Yale University Press, p. 562.

¹³⁶ Michael Reisman (1999). *Theories About Law: Jurisprudence for a Free Society*. Yale Law Journal. Vol. 108, p. 939.

¹³⁷ Reisman, *supra* note 129 at p. 119.

¹³⁸ Michael Reisman, Siegfried Wiessner, & Andrew Willard (2007). *The New Haven School: A Brief Introduction*. Yale Journal of International Law. Vol. 32, pp. 575, 580.

4.3 Five Criteria for a Theory About Law

In order to achieve the goals it sets out for itself theoretically, the New Haven school adapts a number of focal lenses from the social sciences:

a mode of organizing data about various social processes through cultural anthropology's modality of phase analysis and an analytical break-down of the actual components of decision.¹³⁹

The New Haven school of jurisprudence is organized around five major goal criteria: 1) the establishment of observational standpoint, 2) the delimitation of the focus of inquiry, 3) the formulation of particular problems for inquiry, 4) the explicit postulation of public order goals, and 5) the performance of intellectual tasks.¹⁴⁰

4.3.1 The Observational Standpoint

The first goal criterion, the establishment of observational standpoint, requires a distinction to be made:

between the scholarly observer, whose primary concern is for enlightenment, and the authoritative decision maker and others whose ultimate interest is in power, in the making of effective choices.¹⁴¹

Such a distinction is critical to a jurisprudence whose focus is on authoritative and controlling decision because it requires a clarification between the different types of law jobs to which lawyers are tasked. For example, a decisionmaker granted the authority to resolve a particular problem or conflict must evaluate and respond to a mandate that is aligned with the expectations of the parties (participants) involved.¹⁴²

The scholar, or legal discourser, on the other hand, seeks to influence and shape the work of the legal decisionmaker from the outside. The role of the legal discourser, in the context of authoritative and controlling decision, is passive (although often highly influential in shaping future decisions), while the role is the legal decisionmaker – tasked authoritatively with resolving a particular legal problem – is active. Understanding the distinction between what the decisionmaker actually does, and what the discourser claims the

¹³⁹ Id. at p. 576.

¹⁴⁰ Lasswell & McDougal, *supra* note 21 at pp. 3-4.

¹⁴¹ Id. at p. 22.

¹⁴² The New Haven school argues that the participants are part of the decisionmaking process as well. This work holds that the participants are part of the discourse, not the decisionmaking process. Decisionmakers are tasked with making decisions. Participants are not. They are of course part of the process of decisionmaking, but they only exert influence over the decisionmaker through the discursive process.

decisionmaker should do (or should have done), are critical to the framework of inquiry about law that the New Haven school seeks to clarify.

Once one has identified their observational standpoint, the decisionmaker or discourser must engage in a psychological self-analysis or self-calibration of the perspectives, viewpoints, dispositions, personal histories, and worldviews that one brings to these various types of legal endeavors. The decisionmaker or discourser must know what role in the social process they are playing, but they must also know how one's values and identities relate to the process of inquiry about law. Only once these influencing factors are identified can the decisionmaker or discourser be unbiased in his or her approach to the legal problem to which they are tasked.¹⁴³ Reisman states that the importance of the observational standpoint:

arises from the injunction 'know thyself.' It addresses the need to examine one's standpoint and commitments and, in particular, to scrutinize the psychological and emotional factors that operate on the self. In all social sciences, the ultimate tool for perception and evaluation is the self-system itself. That selfsystem is affected by culture, class, gender, national group, crisis experience, etc. In the diverse cross-cultural world we have just described, it is necessary for those who wish to operate with people who are animated by radically different perspectives to make sure they understand themselves and the forces operating on and shaping them.¹⁴⁴

4.3.2 The Focus of Inquiry

The second goal criterion for a theory about law is to delimit the focus of inquiry. The New Haven school holds that:

[t]he broadest reach of an appropriately contextual, configurative, policy-orientated jurisprudence must extend to the whole of the social and community processes in which authoritative decision is an interacting component; yet a viable theory must offer concepts and procedures which will facilitate a focus in whatever precision may be necessary upon particular decisions and particular flows of decisions. The principal emphases of a focus of the required comprehensiveness and selectivity are not difficult to formulate. The central spotlight in such a focus will be empirically and explicitly upon authoritative decision. Decision will be observed as effective choice, composed of both perspectives and operations. Perspectives will be seen to include expectations about both authority and control, and inquiry will be made about both patterns of authority and control in fact. Law will be regarded not merely as a set of rules or as isolated decision, but as a continuous process of authoritative decision, including both the constitutive and public order decisions by which a community's policies are made and remade. This processes of authoritative decision in any particular community will be seen to be an

¹⁴³ Lasswell & McDougal, *supra* note 21 at p. 23.

¹⁴⁴ Weston, *supra* note 118 at p. 277.

integral part, in an endless sequence of cause and effects, of the whole social process of the community. Every particular community will, finally, be observed to affect, and be affected by, a whole complex of parallel and concentric, interpenetrating communities, from local through regional to global.¹⁴⁵

To delimit such a focus of inquiry, the policy-orientated jurisprudence demands: 1) a balanced emphasis on perspectives (the subjectivities and viewpoints that attend choice about preferred claims to value) and operations (the choices actually made and enforced by threats or promises of high indulgence), 2) clarity in conception of both authority and control, 3) comprehensiveness in the conception of processes of authoritative decision (requiring a distinction between constitutive decision and public order decisions), 4) the relation of law to social process (requiring distinctions to be made between public order and civic order, and between minimum and optimum world order), and 5) the relation of law to its larger community context.¹⁴⁶

The delimitation of the focus of inquiry is important because:

it affects the comprehensiveness and realism (contextuality) of inquiry, the manageability with which problems are formulated, and the effectiveness with which different intellectual tasks can be performed. In this perspective, all law is conceived not simply as traditional rules, but in more comprehensive terms, as *decision*, composed of both perspective and operations; as *authoritative decision*, combining elements of authority and control; and not as occasional choices, but as the *continuous process* of authoritative decision, both maintaining the constitutive features by which it is established and projecting a flow of public order decisions for shaping and sharing of community values [emphasis in original].¹⁴⁷

In focusing on decision and its relation to social process, the New Haven school requires a dissection of decision, which it divides into seven distinct functions that are present in all decisionmaking: 1) the intelligence function (the gathering and dissemination of information relevant to decision), 2) the promotion function (the active advocacy of policy alternatives), 3) the prescription function (the projection of community process that is both authoritative and controlling), 4) the invoking function (the provisional characterization of events in terms of a prescription), 5) the application function (the relation of community prescriptions to particular events, with sanctions), 6) the termination function (putting an end to prescriptions and arrangements made in accordance with prescriptions), and 7) the appraisal

¹⁴⁵ Lasswell & McDougal, *supra* note 21 at pp. 24-25.

¹⁴⁶ *Id.* at pp. 25-32.

¹⁴⁷ Reisman, Wiessner, & Willard, *supra* note 138 at pp. 579-80.

function (the intelligence function focused upon past decision and decision process, including ascription of responsibility).¹⁴⁸

4.3.3 The Identification of Particular Problems

The third goal criterion for a theory about law is the identification and formulation of particular problems for inquiry. According to Lasswell and McDougal:

[i]n any community there may be observed a continuous flow of deprivations and nonfulfillments in the shaping and sharing of the values which constitute both the internal social process of that particular community and the larger, external processes of the more comprehensive global community. In consequence of this flow of deprivations and nonfulfillments, many different participants in such social process, in equal continuity, make claims to the established decision makers of the community for the minimization and amelioration of such deprivations and nonfulfillment and for the better securing and protection of their participation in such process.¹⁴⁹

The problems of any community and its individual members that requires authoritative decision consists of disparities and achievement in the shaping and sharing of all values.¹⁵⁰

A problem- and context-orientated jurisprudence such as the New Haven school requires that inquiry into particular problems ought to be formulated according to an anthropological view of global community social processes, which can analyze specific problems and contexts through seven phases: 1) participants (who acted in varying roles that culminated in a particular outcome?), 2) perspectives (what were the subjective expectations and value demands of participants and who did they identify with?), 3) situations (where and under what conditions were the participants interacting?), 4) base value (what effective means and resources were at the disposal of participants to achieve their objective?), 5) strategies (in what ways were these means manipulated?), 6) outcomes (what was the immediate result of this interaction for value allocation), and 7) effects (what are the effects, of differing duration, of the process and outcome).¹⁵¹

¹⁴⁸ Lasswell & McDougal, *supra* note 21 at pp. 24-25.

¹⁴⁹ *Id.* at pp. 32-33.

¹⁵⁰ *Id.* at p. 33.

¹⁵¹ Myres McDougal, Harold Lasswell, & Michael Reisman (1967). *The World Constitutive Process of Authoritative Decision*. *Journal of Legal Education*. Vol. 19, pp. 253, 260-61.

4.3.4 The Postulation of Public Order Goals

The fourth goal criterion for a theory about law is the explicit postulation of public order goals. This fourth criterion is the goal- or policy-orientated aspect of the New Haven school of jurisprudence. It calls for law to be shaped by community values through the process of authoritative and controlling decision. The postulation and clarification of public order goals should be emphasized in contradistinction to their derivation. The comprehensive set of goal values that are recommended for clarification and implementation are those that are characterized as the basic values of human dignity.

A public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: 1) power, 2) wealth, 3) enlightenment, 4) skill, 5) well-being, 6) affection, 7) respect, and 8) rectitude.¹⁵² By postulating a universal goal of human dignity as the benchmark to which all policy goals should be measured, the New Haven school of jurisprudence postulates the values to which all goals and policy formulations should aim. By claiming that there are base values to which all public order goals in international law ought to aim, the New Haven school deviates from the position – common in many postmodern formulations of value subjectivity – that values cannot be accessed empirically as objective phenomena that ought to be pursued regardless of individual preference, self-interest, or opinion.

4.3.5 The Performance of Intellectual Tasks

The final and fifth goal criterion for a theory about law according to the New Haven founders is the guidelines for the performance of intellectual tasks. It is a process of articulating how decisions ought to be made in the context of larger social phenomena. For understanding, describing, and evaluating the law, the New Haven school recommends five tasks: 1) the clarification of community policies, 2) the description of past trends in decision, 3) the analysis of factors affecting decision, 4) the projection of future trends, and 5) the invention and evaluation of policy alternatives.¹⁵³ This fifth goal criterion:

is a prescriptive framework for the performance of optimally rational decision-making
The rationale is that in making a decision of any importance one needs to take into account all available knowledge and probabilities and all possible alternatives before selecting that alternative which maximizes all the objectives of the decision-maker. This

¹⁵² Reisman, Wiessner, & Willard, *supra* note 138 at p. 580.

¹⁵³ Lasswell & McDougal, *supra* note 21 at pp. 35-38.

ideal model was suggested by Dewey, among others, and it continues to characterize most systematic approaches to decision-making.¹⁵⁴

4.4 A Nonpositivist Jurisprudence

With its four defining attributes and its five criteria for a theory about law, the New Haven school has many aspects in common with philosophic pragmatism. In the history of legal philosophy, the New Haven school is also located among theoretical orientations that can be broadly categorized as nonpositivist. A core critique of nonpositivist theories about law from positivist theorists is that values cannot always be articulated in a way that qualify as empirically observable and objective fact.¹⁵⁵ Without an objective means for understanding human values and the goals to which they aim, nonpositivist theories about law are criticized (often crudely) as not be able to meet the objective mandate of law. These critiques hold that the purpose of the law is to overcome arbitrariness and power prerogative; and that this can only be achieved if law claims objectivity. The entire function of the law, these critiques state, is to avoid the problems of subjective self-interest. To overcome this problem, all nonpositivist frames of inquiry must be able to justify the use and application of subjective *value* goals¹⁵⁶ in a way that meets the *legal* goals of objectivity. It is this process of conversion that presents the greatest challenge to all legal theory in the postmodern era.

To address this challenge, the jurisprudence of the New Haven school adapts the methods of inquiry developed in the social sciences and applies them to the prescriptive purposes of the law. They use a multi-method approach for comprehensively mapping social choice. It seeks to develop intellectual tools for bringing about changes in the social process in a manner that will provide a world public order that most closely approximates the goals of a universal value of human dignity. As such, normative concerns are explicitly considered and included in the criteria of legal validity. To overcome the uncertainty (or subjectivity) that such an approach may yield, the New Haven school chose:

¹⁵⁴ Fredrick Tipson (1973). *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*. Virginia Journal of International Law. Vol. 14, pp. 535, 574-75.

¹⁵⁵ According to Falk, “[t]o posit a comprehensive framework of the McDougal and Lasswell variety is to suppress difference, and to suppose that rational value categories can achieve objective knowledge. True, McDougal and Lasswell recommend self-scrutiny in relation to observational standpoint, but they do so to minimize the intrusion of bias, whereas the postmodern position is that there is no way to transcend the particularities of perspective, and hence, what is called ‘bias.’” In other words, according to Falk, the values that McDougal and Lasswell claim are objective (and that all human beings seek them), are really nothing more than their own preference or opinion. Falk, *supra* note 121 at p. 2002.

¹⁵⁶ However, it is absolutely critical to note that goal values are *not* the same thing as self-interest. To claim that value goals are so subjective that they merely state preference or opinion is a basic claim that this work is attempting to overcoming. Values are *not* mere preference.

to focus, as the realists did, on what decisionmakers ought to do in response to legal rules, but New Haven scholars [also] proposed a unique approach to deciding what to do by taking into account basic values and not just self-interest.¹⁵⁷

As stated, the New Haven school defines law comprehensively as an ongoing process of authoritative and controlling decision. This includes both the constitutive process by which law is made and applied, and the flow of public order decisions for the shaping and sharing of all values. The constitutive process of a community refers to those decisions which identify and characterize the different authoritative decisionmakers, specify and clarify basic community policies, allocate bases of authority for sanctioning purposes, and authorize procedures for making decisions.¹⁵⁸ The constitutive process may be analogized to the secondary rules in Hartian legal positivism. The constitutive process for the New Haven school is the process by which law is made, applied, interpreted, and changed by authoritative decisionmakers over time.

All combined, the New Haven school of jurisprudence provide a comprehensive framework of inquiry for describing and evaluating legal decisions in community context. It is not a theory of adjudication but a theory about how to make effective choices about the right distribution of values that are shared by a particular legal community. This idea is based in a claim that knowledge, real knowledge, is produced through systematic approaches to knowledge and truth. While not explicitly a theory that is derived from the basic tenants of philosophic pragmatism, the New Haven school implicitly relies on a number of insights that were developed by Dewey, Pierce, and others in the late nineteenth and early twentieth century. One of the major insights of the philosophical pragmatists was in the claim that knowledge, scientific or otherwise, required judgments to be made; and that these judgments could be accessed rationally. In other words, all knowledge is subjective, but that does not mean that it cannot be capable of objective reflection through rational processes.

5. SHARED SUBJECTIVITY IN CONFIGURATIVE JURISPRUDENCE

Knowledge about value subjectivity is particularly important for nonpositivist frames of inquiry because such frames hold that values can play a role in determining legal validity. This means that, in addition to verifying the source of a particular rule or law as authoritative, the legality of a particular entity is also determined according to whether or not such a legal entity is achieving the goal values it aims to secure and protect. This role for value inquiry in

¹⁵⁷ Cheng, *supra* note 53 at p. 53.

¹⁵⁸ Harold Lasswell & Myres McDougal (1971). *Criteria for a Theory about Law*. Southern California Law Review. Vol. 44, pp. 362, 386.

legal thought is an important aspect of policy-orientated jurisprudence. Shared value subjectivity is a way of conceptually understanding knowledge about values as both subjective and objective. While value configurations will vary from individual from individual, they are also shared more often than not. Instead of calling these shared values as objective, the New Haven school prefers the term shared subjectivities. Why are these shared subjectivities important? Subjectivities are participant perspectives. Perspectives are all the demands, identities, and expectations that participants in a legal community have. These include claims to values. They are subjective because they are the subject who holds them. One of the goals of the New Haven school is to provide sophisticated methods for understanding these perspectives.

One such method for improving understanding about perspective is Q methodology. Often perspectives manifest themselves as empirically observable phenomena such as speech acts, signs, symbols, and the like. However, just as often, one's perspective is an empirically unobservable phenomenon hidden from view by human consciousness. It is these unobservable phenomena that Q methodology can make observable. It therefore may be a very useful method for understanding the law according to any frame of inquiry. However, the New Haven school is particularly well-suited for projects that aim at improved knowledge about subjectivities. Additionally, a partial reason for proposing the integration of Q methodology into the framework of inquiry developed by the New Haven school is because it is an idea suggested by New Haven scholars themselves.¹⁵⁹ There are four references in the literature to the application of Q methodology in international jurisprudential thought, but they come exclusively from two New Haven thinkers.¹⁶⁰ This is not to say that the idea of improving knowledge about shared value subjectivities through a scientific and empirical methodology such as Q methodology could not be applied to many jurisprudential frames. It most certainly can. Perspective is important in any legal theory, and in this way, Q methodology could provide fresh insight into many areas of legal inquiry that traditional thinkers may exclude as being too 'subjective.' Q methodology allows the observer to look at these subjective aspects of inquiry in a manner that is objective and empirically observable.

¹⁵⁹ Andrew Willard (1994). *The Scientific Study of Subjectivity and the Achievement of Human Rights*. Operant Subjectivity. Vol. 17, p. 1; Winston Nagan (2013). *Contextual-Configurative Jurisprudence: The Law, Science and Policies of Human Dignity*. Lake Mary, Vandeplas Publishing; Winston Nagan (2011). *Configurative Jurisprudence and the Clarification and Grounding of Values and Morality in Contemporary Theories of Justice*. World Academy of Art & Science, available at: <http://www.worldacademy.org/files/Configurative%20Jurisprudence%20and%20Contemporary%20Theories%20of%20Justice%20by%20Winston%20Nagan.pdf> (last accessed 1 September 2013); Winston Nagan & Craig Hammer (2007). *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*. Virginia Journal of International Law. Vol. 47, p. 725.

¹⁶⁰ Id.

CHAPTER 5

A THEORY OF CONFIGURATIVE FAIRNESS

1. INTRODUCTION

A theory of configurative fairness is an application of Rawlsian political theory to jurisprudential thought as built on the framework of inquiry developed by the configurative jurisprudence of the New Haven school of international law. It is a theory for the construction and configuration of fair legal orders developed from the premise that law is the result of an ongoing communicative process of authoritative and controlling decision whereby values are shaped and shared in a manner that participants (both lawgivers and lawtakers) of a particular legal community do (or would) endorse or agree to. A theory of configurative fairness seeks to address the problem related to the development or evolution of legal regimes, and how legal regimes perceived as subjectively unfair can be remedied.

Such a theory accepts the premise that perceptions of fairness matter in directing the way that the law develops, and that perceptions of fairness relate to the manner in which values are distributed and maximized in particular legal orders. It is posited that laws perceived as fair by its participants are more likely to be endorsed or accepted as legally binding, and are therefore more likely to comply with the processes and outcomes that such a legal order mandates. In the international system, where there is no single entity that has a monopoly on the mechanisms of violence, it is critical for the authority and control mechanisms of legal orders to require that – absent the application of naked power – the rules and principles that govern the resolution of international legal problems are considered as fair and legitimate by those subject to the rights and duties that a particular legal order compels.

Up to this point, a foundation for a theory of configurative fairness has been laid by looking at: the structure of the distinctions made between fact and value in general philosophic inquiry,¹ the importance of value judgments in both the descriptive and evaluative work of legal theories,² and the difficulty of separating the political from the legal in the structure of international legal understanding.³ In doing this, it is also claimed that values matter in determining the developmental path that legal orders take, and that although subjective,⁴ value knowledge is the product of rational thought processes, and

¹ See Chapter 2.

² See Chapter 3.

³ See Chapter 4.

⁴ Subjective in the sense in the sense that value perspectives emerge from the internal makeup of the individual, state, or institution espousing them.

that the outcomes of these value processes can be accessed in terms of the way that individual human beings share rational convictions and beliefs about particular value orientations in a particular community context.⁵ These shared subjectivities, through the use of Q methodology, can be made empirically observable and thus accessible for inquiry and analysis. This knowledge about shared value subjectivities can be obtained without any need to prove whether these shared values are metaphysically existent and true.⁶ This point concedes that even if definitive and objective truth claims about value are elusive, one can improve knowledge about values through empirical methodologies that aim at observing the shared subjectivities of the participants in a particular legal order.

All of this is critical to a theory of configurative fairness because such a theory claims that if value perspectives (identities, demands, and expectations) are an important consideration for framing any viable theory about law, then one must be able to determine a method and theory for both understanding and taking value perspectives seriously. It is claimed that legal orders that are consistent and compatible with the value perspectives of the participants who use the regime, the more likely that they will be perceived as legitimate and fair. Such a theory claims that legal orders that are accepted as fair and legitimate are more likely to be accepted and complied with. In other words, the only way that a legal order can be accessed in terms of its fairness is through an evaluation of the underlying value distribution that such laws support.

In the postmodern era, there is deep skepticism that such subjectivities can ever be brought to light in a systematic and determinate manner; and yet, it is an empirically observable fact that legal orders – in their purpose as mechanisms for regulating social behavior – are built on a foundation about what members of a community or society *claim* to value. In this way, all law is a human construct, and although there is deep disagreement on the ways in which the law is constructed and configured in postmodern societies, law can

⁵ Shared value subjectivities are configured through community discourse as a form of public reason. This intersubjective discourse, combined with the rational capacity of the mind, will produce a finite number of shared worldviews and viewpoints. While this hypothesis can be empirically verified through the use of Q methodology (i.e. it can be verified that perspectives *are* shared despite their subjectivity), it cannot get us much closer to verify whether those shared perspectives actually exist as objective truths. However, to advance knowledge about shared perspectives, a full blown theory of justice does not need to be developed.

⁶ A theory of configurative fairness focuses on the ability to measure shared value perspectives in the context of legal development. This is significantly narrower than theories attempting to prove the idea of justice. However, a theory of configurative fairness will work, if and only if: 1) it is assumed that value perspectives *do* actually exist (where and how they exist is of less concern), 2) it is assumed that what human beings value can be accessed internally with the human mind through processes of configuration and justification, and 3) it is assumed that community value goals can change over time through processes of external discourse and dialogue with other human beings (communicative action). In other words, value knowledge is the product of two processes: internal rationalism (communication with yourself) and external discourse (communication with others).

be seen as a tool for authoritatively guiding human behavior around values that are shared. If this underlying claim about the structural importance of value in any legal order is true, then a theoretical focus on the fairness of value distribution and value maximization becomes central in both evaluating the law as it is, and how it ought to be. However, by labeling values as subjective, there is an inherent skepticism as to whether values can ever be determined in a manner that fits within the mandate of legal objectivity.

In a way then, gaining knowledge about those values that are shared among a group of human beings is a claim about the shared subjectivity of value as means of making value knowledge objective. This understanding of value theory is essential to an understanding of fairness in the context of legal inquiry. A theory of configurative fairness is agnostic about the metaphysics of value, but optimistic about the objectivity of value epistemology as shared subjectivity. The following section will look at why this conceptualization of value knowledge allows for a distinction between justice and fairness, and why a theory of configurative fairness is not a theory of configurative justice.

According to the value theory endorsed in this work, the fairness of a particular rule, principle, or norm is one that comports with one's own reflective configuration of the values that he or she deems important. These kinds of evaluations are sometimes observable, but just as likely they are empirically unobservable processes of the deliberating mind. The fairness of a legal order is an evaluative enterprise that requires inquiry into two aspects of knowledge: 1) it requires an evaluation of the actual distribution of value in a particular legal order, and 2) it requires a critical evaluation about how these actual distributions comport with the value perspectives held by those accepting that legal order as authoritative and binding. This knowledge will allow the observer to know what configuration of value is fair according to the finite population of participants of a particular legal order.

At this point, however, one may be legitimately asking whether such value perspectives can ever be known given their nonfactual and subjective structure. To give value perspectives an objective character, empirical methodologies for gaining value knowledge must be employed. While there are various qualitative methods for describing and evaluating such subjective perspectives, this work claims that the use of Q methodology can significantly advance the process of epistemically objectifying value in jurisprudential thought. Q methodology, which will be described in detail in the following Chapter, allows for the scientific and objective measurement of first-person subjectivity.

The objectivity is derived from the empirical mapping of perspectives and viewpoints as they relate to the underlying values that form the foundation of any legal order. While not able to determine the objective truth of values in the ontological or metaphysical sense, Q methodology allows for the empirical

measurement of value perspectives. The shared subjectivities that emerge from any Q method study will give a factual character to values in the empirical and epistemic sense of factual objectivity. Without making claims to the ontological truth about the particular values that are endorsed by participants and decisionmakers of a legal order, knowledge about shared subjectivities can permit the legal scholar to configure laws as subjectively fair, but not necessarily objectively just (metaphysically speaking).

A theory of configurative fairness is a theory for creating and maintaining fair legal orders in the context of the development of international law. Achieving this theoretical goal requires that a distinction between justice and fairness be made. It also requires a definition of fairness in the context of value configuration, and an explanation as to why an agreement on the proper distribution of values in the context of legal order development is a critical component in achieving fairness and legitimacy. The following sections will seek to explain configurative fairness as distinct from more general theories of justice, and why fairness as overlapping value consensus is important in the context of evolving international legal orders. As a theory of configurative fairness is a theory in the constructivist tradition, the second major part of this Chapter will explain constructivism as understood in different disciplines. The final part of the Chapter will look specifically at how a theory of configurative fairness can work in legal practice and how the empirical improvement of value knowledge through the use of Q methodology can assist in configuring fair legal orders.

2. FAIRNESS VERSUS JUSTICE

Why fairness as opposed to justice? In everyday discourse, the ideas of justice and fairness have the capacity to be used in conjunction with each other, or even as interchangeable concepts. However, a theory of configurative fairness is not a theory of configurative justice because the former does not make ontological claims about the truthaptness of the good and the right, and the latter does. In other words, a key tenet of any theory of justice is a claim about knowing what is right or what is good.⁷ A theory of configurative fairness is not concerned with determining what is objectively right or good. Instead, a theory of configurative fairness is focused on the configuration of value claims and demands that users of a particular legal order consider to be fair. It is claimed that this can be done even if everybody using a particular legal order is theoretically wrong about what is right or good. In all likelihood, however, the values upon which fair laws are configured will approximate the 'right'

⁷ Nigel Simmonds (2008). *Central Issues in Jurisprudence, Third Edition*. London, Sweet & Maxwell, p. 10.

distribution,⁸ but a theory of configurative fairness cannot guarantee such a claim. This is because there are no metaphysical claims being made about what constitutes the right or the good. A fair legal order may not be a just one. A theory of configurative fairness is primarily concerned with the ordering of value claims, demands, and expectations in a manner that participants in a particular legal order would consider to be fair.

2.1 Distinctions Between Fairness and Justice

To understand fairness in this context, there are a few different ways that the distinction between fairness and justice can be conceptualized. One way is in claiming that a theory of justice is an attempt at determining how human beings ought to treat their own lives and the lives of others. It is a concept about what constitutes moral and ethical goodness (the correctness of values). A theory about fairness, on the other hand, is an attempt at determining the proper distribution of goods and values as they relate to human beings in their interaction with other human beings.⁹ In many ways, it is easy to see how these ideas can be used interchangeably. It is often the case that that which is just is fair, and that which is fair is just. However, under this type of definitional conceptualization of justice and fairness, a distinction can be drawn between these two ideas when a claim about the moral correctness or rightness of a value conflicts with a claim about the how that value should be properly distributed among members of a society. Such a situation could arise when an individual or society understands a particular value distribution as fair, but outsiders condemn the distribution as objectively and universally unjust.¹⁰ In this way, it is possible for a just law to fail to constitute a fair law; and vice versa.

A second way to conceptualize the distinction between justice and fairness relates to the distinction between process and outcome in the context of legal theory. Justice and fairness in this way are divided into procedural fairness and substantive justice. Procedural fairness refers to the processes by which legal rules are determined; it is about making and applying the law in a

⁸ This is a prominent feature of many rationality-based justice theories. The main claim is to hold that all rational beings have the capacity to know the right and the good. This means that the sharing of a particular value configuration is not a coincidence, but is evidence of universal and objective norms or good that are produced through the rational faculty.

⁹ These are primarily theories of distributive justice that focus on the fair allocation of resources among individuals in a particular community. Many distributive theories are based on the underlying value of equality.

¹⁰ This situation suggests the problem with relative truth in political theory and community practices. If a community, through its traditions and histories, believe that a particular practice is fair, then it is also assumed to be right or good according to many postmodern social theories. However, this is more difficult to sustain philosophically when a particular community practice – while perceived as fair by those subjected to such practices – deviates from some claims about a universal standard of what constitutes an objectively just practice.

manner that is considered to meet a certain standard of legitimacy and fairness.¹¹ The product of a fair process will normally produce just outcomes, but not necessarily. Substantive justice, on the other hand, is concerned with measuring the final outcome of a particular legal problem according to a certain standard of what is considered to be just. It is focused on how particular substantive outcomes comport with abstract or idealized and objective notions of justice. Theories of procedural fairness generally claim that so long as the process is right and fair, then the particular outcome need not meet any objective criteria for it to be considered an acceptable or fair result.¹²

A third way of conceptualizing the distinction between justice and fairness is the one that is being utilized in this work. It is a claim about the idea of subjective justice as objectively observable fairness: a theoretical claim about fairness being the construction of a political or legal order around the values that members of a community or society would agree to under a set of conditions (a subjectively constructed – or configured – consensus). The idea of fairness – under the conceptualization used in this work – is only subjectively true in the ontological sense. In other words, it is true if the individual believes it to be so. However, this is only one part of the theory. To make the knowledge about value more than mere preference or feeling (subjectivity in the negative sense), a theory of configurative fairness requires that *shared* value subjectivities must become known.

While still being subjective, such a notion requires an overlapping consensus about value. This brings value knowledge closer to objectivity (that is, all participants would agree to a particular configuration and thus making it appear to be objective). However, while this provides a sufficient basis for a fair configuration of value in a manner that users of a particular legal order would consider fair, it does not demonstrate that the values that are endorsed by a particular community are objectively true, right, or good. In practical terms, however, an identification of the values that are shared and endorsed by a community of actors will likely reflect not only a fair configuration, but a just one as well. The reasons why this is likely the case requires an understanding of the work of John Rawls and his construction of a theory of justice based on the capacity of human reason to know what is objectively just.

¹¹ Normally, this standard is reflected in the ideas of due process and legitimacy (authority plus fairness and inclusivity).

¹² In Tom Tyler's research, he has been able to show, through empirical research, that participants in a particular legal order want the procedures of the law to meet a certain standard of fairness more than they want the outcomes of the law to meet a certain standard of justice. See Tom Tyler (1990). *Why People Obey the Law*. Princeton, Princeton University Press, p. 4.

2.2 Justice as Fairness

John Rawls holds that his theory about justice¹³ (justice as fairness) is built not on a metaphysical conception of justice, but on a political conception.¹⁴ It is a theory of justice that claims that values can be determined through fair processes and distributions based on a minimal postulation of objective justice that all rational beings would endorse.¹⁵ He does this to bypass the problem that such a theory is based on value determinations that are merely the product of subjective preference or self-interest.¹⁶ Rawls holds that there are some basic ontological truths about value construction that all individuals would endorse using their rational faculties. He calls these values the basic structure of a just society¹⁷ and employs a thought experiment¹⁸ for determining such principles. He calls this limited approach his ‘thin theory of the good:’ it is a minimal claim about universal and objective moral truth based on human reason.¹⁹ It can demonstrate, he believes, why individuals would choose his two principles of justice in the original position, and that these two principles are objectively and universally true.

Acknowledging that value distribution in societies and communities change over time, and that such a contextual and postmodern perspective makes an absolute and universal declaration about the metaphysical truth of moral and ethical values seem ill-founded, Rawls claims that human rationality would always choose his two basic principles of justice when behind the ‘veil of ignorance.’²⁰ While this is an unprovable supposition about the metaphysical truth of such a claim, it serves a practical function. In many ways, Rawls’ idea about the foundation of his thin theory of the good mirrors the postulated values of human dignity in the New Haven jurisprudence.²¹ While both theories claim that justice and human dignity are objectively determinable, they do so based on assumptions, not absolute proof. While this has always been a source of criticism in both theories, it is necessary from a practical perspective in building a theory about what constitutes the ‘right’ distribution of value in a particular context. The alternative would be to develop a theory about justice or law that is built on a foundation of abstract notions of

¹³ John Rawls (1971). *A Theory of Justice*. Cambridge, Harvard University Press.

¹⁴ John Rawls & Erin Kelly (2001). *Justice as Fairness: A Restatement*. Cambridge, Harvard University Press, p. 7.

¹⁵ Simmonds, *supra* note 7 at pp. 66-67.

¹⁶ This is a reference to subjectivity as it is used in the negative sense: what conscious beings value are merely those entities which they desire through the motivation of rational self-interest. Rawls distinguishes between the ‘rational’ and the ‘reasonable’ in order to differentiate between values that could be rationally endorsed out of self-interests, but that would nonetheless be unreasonable when attempts at public justification are made.

¹⁷ These are the two principles of justice that form the basis of his theory of justice as fairness. See Section 4.3.1 of this Chapter.

¹⁸ This is the ‘veil of ignorance’ in the original position. See Section 4.3.1 of this Chapter.

¹⁹ Simmonds, *supra* note 7 at pp. 66-69.

²⁰ *Id.* at pp. 81-85.

²¹ See Chapter 4, Section 4.3.4.

injustice, unfairness, or human indignity. For good reasons, a theory about law or justice built on abstract notions of human dignity and justice seems a better course than the aforementioned alternative.²²

However, part of the rationale for developing a theory of configurative fairness is that it bypasses the necessity of even these kinds of idealizations or suppositions. A theory of configurative fairness is not as concerned with justice as it is with perceptions of fairness (which, however, in practical terms will often overlap). As stated, and in contrast to a theory of configurative fairness, the Rawlsian approach to justice is not completely agnostic about the ontological, objective, and universal truth about values. Instead, he claims that justice is a political and practical construct that rational and reasonable human agents in a liberal society would agree to.²³ His theory attempts to chart a middle way between value skepticism and value universality. To do this, he formulates a theory of justice as fairness whereby fairness is the ‘right’ distribution of values in a particular society or community as determined by right (rational) thinking members of that society or community through an impartial process of value determination and distribution: justice is a fair starting point for determining public political values.²⁴

While such a theory is built at a high level of idealization, the basic idea is that there is a practical and political means by which a liberal society can determine the right distribution of values. In this way, it is a theory of justice as both objective and subjective justice (which he calls fairness). For Rawls, the subjectiveness of justice is not akin to arbitrariness or some other form of emotivism or moral antirealism; rather, it is subjective in the sense that the just distribution of values is rooted in the rational capacity to make choices about the ways that particular values ought to be distributed in a society. It is an objective theory of justice because it is built on a foundation of two principles of justice that he believes are capable of being universally true. From this objective foundation, Rawls claims that individuals living in a diverse society can make choices about *particular* values and their distribution in that society.

While highly influenced by the Rawlsian conceptualization of justice as fairness, a theory of configurative fairness does not go quite this far. It does not make any claims (even minimal) about the ontological truth of justice. Instead, it claims that fairness is the configuration of value distribution that human beings would agree to in the context of a particular legal order to which they are subject. It does not make any claims to whether or not the values that human beings choose are objectively and ontologically true, or

²² This is a major tenet of Amartya Sen (2011). *The Idea of Justice*. Cambridge, Belknap Press.

²³ Rawls believes that this can only be accomplished if there is a foundational claim (his two principles of justice) that sets out the criteria for a fair system of cooperation upon which particular values in a liberal society can be agreed.

²⁴ Rawls, *supra* note 14 at pp. 5-6.

whether they are morally right or wrong. In this way, it is a theory about fairness configured according to knowledge about shared value subjectivities in a particular context. A theory of configurative fairness is a theory of legal fairness that is defined as what value distribution and maximization a right thinking community of actors would agree to through the employ of an ongoing process of value discourse.

3. WHY FAIRNESS MATTERS

The previous section attempted to explain the parameters for a discourse on what constitutes the concept of fairness and justice, and where and how such ideas might exist in the context of human social understanding. The next question to ask is: why care about fairness in the context of legal orders? It would seem that if the description of legal validity is not contingent on moral or ethical value, then there would be no reason for considerations of justice or fairness to be something that forms an integral component of what is, or ought, to be considered the law. This type of legal understanding and its relation to justice and fairness is exclusively aimed at conceptual theories about what constitutes legal validity. It is the age old argument that validly recognized laws can be unjust and that the unjustness of the law does not make it any more or less valid as law. While this is a debatable issue, and forms one of the core debates in modern analytic legal philosophy, it is distinct in many ways to the description and evaluation of the *content* of legal, social, and political norms. The development or evolution of legal orders does not occur in a conceptual vacuum. The process of determining the fairness of legal rules and processes is thus concerned with the way that legal rules and processes are perceived by the participants to which the legal order aims. The issue then, in practical terms, and in terms of why fairness should or does matter, is in how such an idea can be used to configure the content of laws in a way that is acceptable to its participants.

For most conceptual legal theorists, a legal rule is one that has been created by a legitimate authority and that such a rule is posited as intending to create a legal obligation. The actual content of the law is less important than knowing its pedigree or source. However, the purpose of making this distinction between legal concept and legal content is to place a theory of configurative fairness in the context of its purpose. It is not a conceptual theory for determining legal validity;²⁵ it is rather a theory for determining legal content. Fairness thus matters in the context of legal inquiry in two important ways, both of which relate to the evaluation of the legal content that makes up the

²⁵ However, as noted in the previous Chapter, there are subjective aspects even in the determination of legal validity (such as the sense of obligation) and it is these aspects that may also benefit from theoretical approaches that seek to improve subjectivity and value more generally in legal theory.

procedural and substantive rules of any legal order. First, fairness matters as a standard of evaluation for legal content (substance). Second, fairness matters as a standard of evaluation for the process by which legal content is determined (process). Knowing what users of a particular legal order consider to be fair legal content and fair legal process are important epistemic goals for a theory of configurative fairness.

3.1 Thomas Franck's Fairness

In looking to determine how legal content and legal processes can be accessed in terms of their fairness, an exposition of Thomas Franck's account of fairness in international law is warranted.²⁶ His philosophical account²⁷ of legal fairness is important in understanding why a theory of configurative fairness is concerned with the content and processes of legal rules, norms, and procedures; and why perceptions of fairness are especially important in the context of international legal development. His account of the international legal system focuses on its fairness and how the legitimacy and fairness of both legal process and content are essential to understanding how a legal order can make demands for both stability and change.²⁸ He claims that at the international level, the lack of domestic-style enforcement mechanisms means that the law must be perceived as fair and legitimate by those to which the law is subjected. To do this, Franck focuses on a constructivist account of international law that contemplates a process by which fair legal systems can be developed. His theory, like that of the New Haven school, is normative in orientation. This means that, for Franck, the law must be accessed according to how well it comports with *his* notion of fairness.²⁹

According to Franck's account, the description of any legal order must be done in the context of how the evaluation of the processes and substantive rules and principles comport with his standard of fairness. Franck holds that the fairness of any legal order requires an evaluation of two distinct components: 1) fairness as procedural legitimacy and 2) fairness as distributive justice.³⁰ Combined, these components constitute fairness in the legal context. Franck claims that the importance of fairness in these two respects corresponds to the following needs:

²⁶ Thomas Franck (1995). *Fairness in International Law and Institutions*. Oxford, OUP.

²⁷ Some scholars claim Franck's theory about international law to fall within the constructivist tradition. See Richard Steinberg & Jonathan Zasloff (2006). *Power and International Law*. American Journal of International Law. Vol. 100, pp. 64, 82. Others have categorized Franck's work as a 'philosophical' account of international law. See Harold Koh (1997). *Why Do Nations Obey International Law?* Yale Law Journal. Vol. 106, pp. 2599, 2637.

²⁸ Franck, *supra* note 26 at p. 7.

²⁹ For a critique of Franck's notion of fairness, see John Tasioulas (2002). *International Law and the Limits of Fairness*. European Journal of International Law. Vol. 13, p. 993.

³⁰ Franck, *supra* note 26 at p. 7-9.

[t]he notion of 'fairness' encompasses two different and potentially adversary components: legitimacy and distributive justice. These components are indicators of law's, and especially fair law's primary objective: to achieve a negotiated balance between the need for order and the need for change.³¹

Under this account of fairness, the fairness of any legal order is managed by the discursive process by which distributively (equitable) just rules and principles are agreed to through a legitimate and fair process.³² By focusing on the legitimacy of the process and how such a process of rulemaking and ruleapplying can be done in a fair manner, Franck holds that it is possible for rules and principles to change and evolve over time so as to reflect the legitimate expectations of the participants in a legal order.³³ Such a view is in many ways similar to that of the New Haven school; it is focused on law as an ongoing process of communicative decision – not a stagnant order – whereby decisionmakers evaluate and secure participant value expectations over time.³⁴ What both the New Haven school and Franck have in common is a feature in almost all postmodern constructivist frames of inquiry for determining and evaluating the making and applying of the law: a process for a process.

The question for a theory of configurative fairness is just how such an ongoing discursive process should be constructed. All constructivist accounts of law, which will be discussed in more detail in the following section, are concerned with how the process of law operates in social context. By placing law in social context, there are also aspects of legal process and construction that appeal to psychological and social psychological inquiry. In terms of the development of legal orders over time, and in finding a means for creating laws that are both stable and adaptable, the manner in which institutions and individuals accept the legitimacy of a legal order relates directly to how those entities psychologically perceive the legal rules and processes as fair.³⁵

According to Thomas Franck's account, the perceptions of fairness that are held by participants in a particular legal order pull them towards voluntary compliance.³⁶ That is, if the law is perceived as fair, it is more likely to be complied with.³⁷ This is where a theory of configurative fairness attempts to contribute. It claims that, in the context of evolving legal orders, fair laws can be configured through a process of determining convergences in value perspectives among its participants. Once determined, the rules and principles (both substantive and procedural) of any legal order can be constructed as

³¹ Id at p. 23.

³² Thomas Franck (2001). *Fairness in Fairness Discourse*. American Society of International Law Proceedings. Vol. 85, p. 167.

³³ Franck, *supra* note 27 at pp. 14-15.

³⁴ See Chapter 4, Section 4.

³⁵ See generally Tyler, *supra* note 12.

³⁶ Franck, *supra* note 26 at p. 89.

³⁷ Id.

based on these convergences. Such a conceptualization of fairness requires some sensitivity to the psychology of fairness (that is, the internal endorsement of the law as fair: a perception of fairness), and to the purpose of the law as seen through the lens of social context (that is, law as the product of a fair intersubjective process of social interaction and choice). However, a theory of configurative fairness may be able to fill an empirical gap in Frank's theory. Without a means for determining what participants in a particular legal order consider to be fair, Frank is left to configure fair laws according to his own conception of fairness (which may or may not be what actual participants consider to be fair). A theory of configurative fairness provides a methodology for determining not what the theorist considers to be fair, but what participants consider it to be.

3.2 The Centrality of Participants in Legal Evolution

By focusing on the actual participants of a particular legal order, a theory of configurative fairness seeks to evaluate participant perspectives about the values that inform, motivate, and shape the way that such individuals approach legal problems. Instead of focusing on what a just or fair society ought to look like, a theory of configurative fairness ask those with a stake in a particular legal order what they actually value. This shifts the analysis from the abstract to the actual. Take for example when one asks, in the context of any legal evaluation: is it fair? In this question, the 'it' refers to the rule, principle, norm, law, system, or regime being evaluated. And a determination of fairness falls to those individuals being subjected to 'it.' Fairness, thus, is a particularly subjective enterprise, requiring the viewpoints and perspectives of those participants actually being impacted or affected by 'it.' Yet, fairness is often analyzed against some objective or universal criterion – imposed on the subject according to the prevailing power dynamic, and with little regard to the views of the subjects being affected by 'it.'

What this question addresses is the problem of the participant in any theory of justice that seeks to know objectively what is fair. It often comes down to the theorist postulating what he or she divines as what a just or fair principle or rule would look like if derived from an idealized version of human agency and in an idealized set of circumstances and conditions (such as in Frank's theory). While there are frequent claims as to what people ought to value, there is rarely any evidence to back up the notion that that a particular theorist has the capacity and omnipotence to know just what all individuals must value.

Unlike most justice theories, which make claims to objective truth about what is right or what is good, a theory of configurative fairness cannot claim an objective or universal standard: the fairness of anything comes down to how

the idea, concept, or theory comports with one's own subjective constitution and the values that he or she endorses. As a metaclaim about values, fairness requires an evaluation of values from the perspective of the person doing the valuing. This cannot be done without an understanding of the perspectives that participants in any legal order bring to bear on their understanding of fairness. In almost all of the social sciences, there is the realization in the postmodern era that values are constructed in the minds of individual conscious beings interacting with each other and the external world.

In psychology, the advances in the cognitive sciences have advanced understanding about mental processes and how the mind constructs value knowledge; yet, there is a long ways to go. In many ways, theory is ahead of the method in this area of thought. By focusing on the actual perspectives of participants in a particular legal order, a theory of configurative fairness – through its employ of Q methodology – hopes to add insight into whether the question 'is it fair?' can be answered more concretely than in the past. The process for determining a more concrete answer to this question will come through an empirical understanding of shared value subjectivity, not as transcendental claims about what is objectively just.

4. CONSTRUCTIVISM IN POLITICS AND ETHICS

Theories of construction exist in many disciplines, and while they vary depending on the subject-matter being theorized about, they all contain an element of explaining truth and knowledge as something that is constructed by human beings through a process of interaction with their own minds, the minds of others, and with the external world.³⁸ In the context of social theory, which includes constructivist theories in political, legal, and sociological thought, social reality and truth exists – not as some abstract entity – but as the way that human beings construct their reality through a process of interaction, choice, and deliberative inquiry. Some of these social constructivist theories attempt to provide a theoretical account for a metaphysically objective reality through an understanding of how human beings shape it.

Others take a more pragmatic approach, focusing instead on how human beings shape and share their understanding through an ongoing process of communication and interaction that is subject to revision over time. These more pragmatic theories are less concerned with knowing a metaphysical

³⁸ "Constructivism in ethics is the view that insofar as there are normative truths, for example, truths about what we ought to do, they are in some sense determined by an idealized process of rational deliberation, choice, or agreement." Carla Bagnoli (2011). *Constructivism in Metaethics*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/archives/win2011/entries/constructivism-metaethics> (last accessed 1 September 2013).

reality, and are more concerned with developing epistemic theories for knowing reality as human beings understand it. Both types of theorists believe that reality and truth are the result of a process of human interaction. Where they differ is in the potential for such a conceptualization to result in absolute truth and knowledge. Regardless of how one approaches the metaphysical question, constructivist and pragmatist theories seek to explain human value knowledge as mental processes of deliberation, justification, and argument that are shaped by the intersubjective discourse between human agents.

4.1 Philosophic Constructivism

The various types of social, political, ethical, and legal constructivism are built on more general philosophical inquiry about the nature of truth, knowledge, and morality. These types of constructivism can be seen throughout the history of philosophy, but have been greatly influenced in the postmodern era through the work of Kant and the philosophic pragmatists. Both the Kantian and pragmatic approaches to moral truth are based on the idea that the rational human mind is capable of deciphering truth and knowledge. A Kantian view on ethics holds that the autonomy and independence of reason has the capacity to produce metaphysically objective moral ends.³⁹ For Kant, moral norms are authoritative only if they are generated by reason.⁴⁰ He claims that skepticism can only be avoided if reason is autonomous and its authority does not derive from anything outside its domain.⁴¹ Accordingly, reason is self-legislating: the human mind alone can construct objective truth about what is right. What this picture of Kantian ethical theory claims is that the rational mind has the capacity to construct objective moral reality a priori.

However, in an influential article, *Kantian Constructivism and Moral Theory*,⁴² John Rawls offered a reinterpretation of Kant's ethical theory. He claimed that Kant's account of ethics fails to effectively address the problem of ethical disagreements because it adopts an inadequate standard of objectivity.⁴³ This

³⁹ Id.

⁴⁰ Id.

⁴¹ The term 'outside its domain' is a reference to knowledge about morality that are attempted by appeals to experience and the natural world. Kant, and Rawls as well, believed that moral knowledge could be generated by reason alone. One of the criticisms launched against Kant in his own time by the idealists held that what human reason could understand was based not only on the mind constructing reality in isolation; rather, the idealists and the historicists held that while reason alone could understand morality, this knowledge must be seen as the product of a dialectical discourse between intersubjective selves existing in community context. Similarly, Rawls theory has been criticized for downplaying the role that social interaction and community histories play in the way that the human mind can reason about morality. For the communitarian response to Rawls, see Michael Sandel (1998). *Liberalism and the Limits of Justice, Second Edition*. Cambridge, CUP.

⁴² John Rawls (1980). *Kantian Constructivism in Moral Theory*. *Journal of Philosophy*. Vol. 77, p. 515.

⁴³ Id at p. 570.

inadequate standard is metaphysical and appeals to the independent reality of truth and values. Rawls sought to show that a more realistic conception of objectivity is not metaphysical, but political.⁴⁴ He was concerned with the coordination problems in pluralistic societies whereby individuals often hold different, and to some extent, incommensurable moral views.⁴⁵ He believed that our need for objectivity (which this work would call shared subjectivity) is practical; it arises in context in which people disagree about what to value and need to reach an agreement about what to do.⁴⁶ Rawls wanted to base his theory of justice on the idea that moral views could be determined by reason, but refused to adopt the Kantian metaphysical view that there is a single correct answer about the 'right.'⁴⁷

Rawls conception of constructed moral reality has much in common with the tradition of the philosophic pragmatists.⁴⁸ This is because, while accepting the rational turn in Kantian philosophy, the philosophical pragmatists hold out more skepticism about the likelihood that absolute truth can be generated by reason alone (Kant's view). Instead, the pragmatists take a much more practical view: truth and knowledge are the product of inquiry and that the process of inquiry is a dialectic method focused on pragmatic consequences, and not as a body of philosophic doctrine. In terms of theoretical orientation, the pragmatic theory of truth can be seen to include two core features: 1) a reliance on the pragmatic maxim⁴⁹ as a means of clarifying the meanings of difficult concepts, truth in particular; and 2) an emphasis on the fact that belief, certainty, knowledge, and truth is the result of a process, namely, inquiry.⁵⁰

⁴⁴ John Rawls (1985). *Justice as Fairness: Political, not Metaphysical*. Philosophy & Public Affairs. Vol. 14, p. 223.

⁴⁵ Rawls, *supra* note 13 at pp. 32-33.

⁴⁶ *Id.* at p. 36.

⁴⁷ Simmonds, *supra* note 7 at p. 64.

⁴⁸ Philosophic pragmatism historically is broken into two distinct periods: classical pragmatism, which prominently features the late nineteenth and early twentieth century work of Charles Pierce, William James, George Mead, and John Dewey; and neopragmatism, which is the middle to late twentieth century revival of pragmatic thought that recognizes the linguistic turn in postmodern philosophy generally and is exemplified through the work of an number of influential philosophers: Richard Rorty, Hilary Putnam, Jacques Derrida, WVO Quine, and Stanley Fish (although none of these philosophers call themselves neopragmatists).

⁴⁹ The pragmatic maxim, a concept for inquiry developed by Charles Peirce can be summarized as: "the opinion that metaphysics is to be largely cleared up by the application of the following maxim for attaining clearness of apprehension: consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." Charles Peirce (1878). *Second Paper: How to Make our Ideas Clear*. Popular Science Monthly. Vol. 12, pp. 286, 293.

⁵⁰ For John Dewey, truth is related to inquiry, and regardless of whether such inquiry is sociological, ethical, philosophical, scientific, or legal, it is self-corrective over time if it is openly submitted for testing by a community of inquirers in order to justify, clarify, refine, and or refute proposed truths. See Elizabeth Anderson (2012). *Dewey's Moral Philosophy*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/archives/fall2012/entries/dewey-moral> (last accessed 1 September 2013).

For William James, the Peircean pragmatic maxim is developed as an understanding of truth and knowledge that is often summarized by the statement “the ‘true’ is only the expedient in our way of thinking, just as the ‘right’ is only the expedient in our way of behaving.”⁵¹ By this, James is saying that truth is that which is confirmed by its effectiveness when applying concepts to actual practice. He claims that the mind and the world jointly make truth. This idea of making truth holds that it is both mutable and relative. While the pragmatic understanding of truth and knowledge predates many of the constructivist and contractualist debates that have permeated the political and ethical discourse over the past fifty years, it is a definition of truth that is very similar to that which is used in a theory of configurative fairness: value knowledge is the product of a changeable, relative, and ongoing process of deliberative communicative interaction.

From this brief introduction on the way that truth is conceived in pragmatic thought, a pattern of concepts emerge that resonate with many postmodern philosophical theories: contextualism, relativism, and (de)constructivism. Both pragmatism and constructivism can be seen to embrace at least some aspects of each of the following: 1) antifoundationalism,⁵² 2) antireductivism,⁵³ 3) contextualism,⁵⁴ 4) relativism,⁵⁵ 5) proceduralism,⁵⁶ 6) perspectivism,⁵⁷ 7) instrumentalism,⁵⁸ and 8) consequentialism.⁵⁹ The point of dissecting some of the features of pragmatism and constructivism is to show their connection in general philosophic inquiry, but also to set the stage for examining the relationship between philosophic pragmatism and constructivism, and its influence on legal pragmatism, legal realism, and legal constructivism. There are close ties between all of these orientations, and regardless of whether or not specific theories make explicit reference to pragmatism and constructivism, almost all postmodern process-, context- and problem-orientated approaches to knowledge can be seen to have been greatly influenced by a long tradition of constructivist thought in the history of philosophy.

⁵¹ William James (1907). *Pragmatism*. London, Longman, p. 222.

⁵² Antifoundationalism is the terms given to any branch of philosophy that does not believe that there is some basic principle or ground upon which all inquiry and knowledge rests.

⁵³ Antireductionism is the idea that embraces holism: i.e. it is a view that complex phenomena cannot be reduced to simplistic and often ill-fitted models.

⁵⁴ Contextualism is a collection of views in philosophy that emphasizes context. It is a view that knowledge and truth is contingent on the context of particular inquiry.

⁵⁵ Relativism is the idea that knowledge and truth is relative to context.

⁵⁶ Proceduralism is the view in philosophic thought holding that knowledge and truth is the product of the process of inquiry.

⁵⁷ Perspectivism is the philosophic view that all ideas take place from particular perspectives. In other words, all knowledge is contingent on the viewpoint of the mind that is perceiving it.

⁵⁸ Instrumentalism is the philosophic view holding that concepts are instruments for understanding the world. It is a view that inquiry ought to be delineated as a means-end relationship.

⁵⁹ Consequentialism is the view that normativity ought to be assessed in terms of the consequences that would result from a particular course of action or judgment.

4.2 Constructivism Versus Configurativism

Before turning to constructivism in law, it may be useful to look briefly at the moral philosophy of John Dewey as a means of demonstrating the link (and differences) between early twentieth century pragmatism and late twentieth century political and ethical constructivism (and philosophical neopragmatism). Dewey believed that neither traditional moral norms nor traditional philosophical ethics were up to the task of dealing with contemporary moral dilemmas. He claimed that traditional philosophic ethics sought to discover fixed moral standards through dogmatic methods:

its preoccupation with reducing the diverse sources of moral insight to a single fixed principle subordinated practical service to ordinary people to the futile search for certainty, stability, and simplicity.⁶⁰

To address this inadequacy, Dewey's ethics replaces the goal of identifying an ultimate end or supreme immutable principle with a goal of identifying a method for improving our value judgments through a process of inquiry.⁶¹ Dewey argued that ethical inquiry was a piece of epistemic empirical inquiry more generally whereby reflective intelligence (reason) could be used as a means for revising one's judgments in light of the consequences of acting on them.⁶² Judgments can be evaluated in instrumental terms of how successful they are in guiding conduct. These value judgments are tested by putting them into practice and determining:

whether the results are satisfactory, whether they solve the problems they were designed to solve, whether we find their consequences acceptable, whether they enable successful responses to novel problems, whether living in accordance with alternative value judgments yields more satisfactory results.⁶³

For Dewey, moral progress is achieved when a method of inquiry for evaluating our value judgments is determined through a process of reflection, revision, argument, justification, and conviction.

The type of pragmatic ethics that Dewey advocated continues to exert influence on political and ethical discourse in its focus on an epistemic process of inquiry for understanding how one knows and makes value judgments. However, the postmodern turn in philosophic inquiry, and its renewed emphasis on various forms of moral, epistemic, and ontological skepticism can be seen as drawing a line between theories of construction and theories of configuration. The distinction pertains to whether or not morality is invented (constructivism) or discovered (configurativism). In philosophic terms,

⁶⁰ Anderson, *supra* note 50.

⁶¹ Id.

⁶² Id.

⁶³ Id.

constructivism holds a skeptical view on the possibility of any sort of objective value knowledge (whether mind-dependent or mind-independent), while configurativism holds the view that objective value knowledge is possible.

Classical pragmatists were of the belief that making truth in morality was the cognitive processes of inquiry relating to empirically discovering value. Under such a view, value knowledge is both possible and real. Neopragmatists, especially Richard Rorty, hold a more skeptical view about truth and knowledge (in either the moral or scientific world) in general.⁶⁴ They claim that whatever views one holds about what is true is invented; truth is constructed from a practical reality. They are not however capable of truth.

While the philosophic constructivists get pushed out of the debate when framed as a shift in understanding of moral reality between the pragmatists and neopragmatists, it does show the effect of postmodern philosophic thought on the way that the truthaptness of moral properties are conceived. Some constructivists are actually configurativists. That is, in terms of value knowledge and truth, constructivists and configurativists differ in whether values are invented (constructivist are skeptical about objective value knowledge) or discovered (configurativists are antiskepticism about objective value knowledge).

True constructivists under this kind of categorization would hold a more skeptical view about the truth capacity of values at all. Since one cannot know truth about facts or values in any real sense, the way that one constructs reality is the manner in which human beings subjectively invent it. Under such a view, practices and beliefs are the product of habit and agreement among right thinking human agents interacting with each other and the world, but they are not possible of truth in any metaphysical sense. Configurativists on the other hand, hold that truth about morality, and value judgments more broadly, are possibly capable of truth; but that in practice, the best one can do is to improve our methods for empirically knowing values and to use that knowledge to configure a value system that is acceptable in the minds of all right thinking conscious beings. Most constructivists in social, political, and ethical thought are actually configurativists.

It may be difficult to see how a theory of configurative fairness is not a theory of constructive fairness according to these aforementioned distinctions. It may also be difficult to reconcile the view of configurative fairness as ontologically agnostic and epistemically optimistic without also making the claim that the way that human beings configure their moral world will not necessarily produce any universal truths. However, being agnostic about the ontology of values is not a form of skepticism. Rather, it is a claim holding that at the present time, the human mind is not capable of discovering their truth value

⁶⁴ See generally Richard Rorty (1989). *Contingency, Irony, and Solidarity*. Cambridge, CUP.

in an ontologically verifiable manner. This is not that different than the analogies that can be made with ontological truth in the natural world. Scientists are fairly certain that an entity that called ‘dark matter’ exists; and yet, the scientific world cannot say that it does. This does not prevent scientists from refining methods of inquiry for its discovery.

In the fields of ethics and morality, there is the further problem of not knowing whether ethical or moral truths exist as naturalized phenomena ‘out there’ in the world or whether they are the product of the human mind exclusively. Given this further complication in ethical thought, it is not perverse to claim agnosticism ontologically, but at the same time, to continue to pursue methods of inquiry for knowing values. In practice, these need not be mutually exclusive enterprises. We know for example that torturing babies for fun is not a practice that any rational human being anywhere on the planet would find acceptable.⁶⁵ There is something truthlike in these types of claims. It would appear that there is a metaphysical truth about the value that *all* conscious beings would place on rejecting such a practice. However, I am at odds in telling you definitively whether a value truth like this certainly exists or not (and if so where it does it exist). But at the same time, I am keen to believe that such a value does exist. This is what can be considered ontological agnosticism in a theory of configurative fairness.

A theory of configurative fairness holds that value truths are possible, but that instead of focusing on where and how they exist, the practical expediency of attempting to discovery what systems of values a community can agree to as acceptable should be the focus of inquiry. Such a process of inquiry is not creating values from nothing; rather, it is the process of discovering what values a particular community of actors can live by.

Two contemporary philosophers have been particularly decisive in this debate about how value knowledge is discovered, and therefore a brief explanation of their theoretical orientation may be helpful in understanding a theory of configurative fairness. These theorists are Ronald Dworkin and Hilary Putnam, and they are both skeptical about the mind-independence of values. However, they both embrace a form of moral realism. They hold that the entire corpus of knowledge and truth about value is constituted through the thought processes of the rational mind. While being skeptical about morals as naturalized entities (Dworkin likes to call such supposed entities as ‘morons’),⁶⁶ they both hold that whatever truth about values and morality that exists (if at all) does so in the minds of conscious human beings. Both establish a framework of inquiry for understanding how the mind configures values. Putnam calls his theory one of internal realism, while Dworkin calls his a unitary theory of value.

⁶⁵ Ronald Dworkin (2011). *Justice for Hedgehogs*. Cambridge, Belknap Press, p. 27.

⁶⁶ Id at p. 43.

4.2.1 Internal Unity of Value

On Dworkin's account, which he details in his book *Justice for Hedgehogs*,⁶⁷ there are no second-order or foundational claims about morality that are possible. Truth (as it can be known) exists in understanding and justifying moral claims through a process of acceptability. All moral knowledge is a unitary concept that gains or loses currency through the arguments that are made about moral values and their relation to other moral values. According to Dworkin:

[t]he truth about living well and being good and what is wonderful is not only coherent and mutually supporting: what we think about any one of these things must stand up, eventually, to any argument we find compelling about the rest.⁶⁸

The core claim is that "ethical and moral values depend on one another."⁶⁹ Dworkin believes that the way that our moral positions are justified requires reference to other moral values, and to reconcile these views in a manner that allows for the discovery of a unified moral position about our convictions. He claims that it is this process of argument and conviction about values that leads to an acceptable justification of first-order moralizing. First-order moral values comprise the corpus of moral positions that individuals hold. Second-order moralizing is what is considered metaethical theorizing. Dworkin holds that metaethics is misguided because it rests on the assumption that there are real moral properties that are knowable about morality that are external to particular moral propositions.⁷⁰ Instead, he claims that values only consist of first-order moral propositions, and that there are no second-order ones.⁷¹

The point of Dworkin's view is to demonstrate two important ideas in moral thought: 1) the possibility that, despite what appears as a plurality and diversity of seemingly incommensurable values, values are in fact mutually reinforcing and coherent when viewed as a unitary system of justification, and 2) the possibility that we are looking for the wrong types of entities when attempting to show that values exist, and that it would be more advisable to view value truth as the ongoing process of argument and justification of one's moral conviction.⁷² In essence, Dworkin is calling for a process of interpretation for discovering what moral values one can or should endorse in living a responsible and respectful life.⁷³

⁶⁷ Id.

⁶⁸ Id at p. 1.

⁶⁹ Id.

⁷⁰ Id. at p. 67.

⁷¹ Id. at pp. 30-31.

⁷² Id. at pp. 1, 37.

⁷³ Id. at p. 6.

4.2.2 Internal Value Realism

In a similar vein, but geared towards epistemology more generally, is the work of the contemporary pragmatist philosopher, Hilary Putnam. Putnam has focused a large amount of his career on trying to reconcile antiscepticism with fallibilism.⁷⁴ In terms of epistemology and ontology, these two terms relate to how our concepts of the world are sometimes wrong or are in need of constant revision. Most philosophers see the fallibility of knowledge as an indication that one must then also be skeptical about the possibility of knowing truth. Putnam, and other pragmatists, take the opposite approach. Instead, they hold that the fallibility of our ideas is part of the truth.⁷⁵ Putnam has developed a theory of internal realism that claims that despite one's subjectivity, the mind can discover truths about the world.⁷⁶

In *Reason, Truth, and History*,⁷⁷ Putnam identified truth with what he terms 'idealized rational acceptability.'⁷⁸ While the exact parameters of Putnam's internal realism are difficult to assess, there are a couple important points about this philosophical outlook that pertain to pragmatic and constructivist thought. The first point is that whatever truth exists about morality and value does so in the form of a relationship between the human mind and the external world.⁷⁹ Such a view holds that the way that the human mind categorizes and constructs knowledge is integral to our understanding of both facts and values.⁸⁰ Knowledge about facts (external truth) and values (internal truths) can only be known through the engagement of the human mind with the mind-independent external world.⁸¹ Such a conceptualization of truth and knowledge permits the possibility that truth is not a stagnant entity, but instead is a process of mind constructing the world and the world constructing the mind.⁸²

Another key point related to internal realism is the idea of reasonableness and acceptability.⁸³ These two seemingly vague standards are common to most forms of philosophical constructivism, especially in regard to the formulation of ethical and political truth and knowledge. Reasonableness and

⁷⁴ This is the view that truth is both possible and fallible. In other words, there is no metaphysical guarantee that what one calls 'truth' will not be subject to revision over time. See Hilary Putnam (1994). 'Pragmatism and Moral Objectivity,' in James Conant, ed. *Words and Life*. Cambridge, Harvard University Press, p. 152.

⁷⁵ Hilary Putnam (1986). *Realism and Reason: Philosophical Papers, Volume III*. Cambridge, CUP, p. 19.

⁷⁶ See Hilary Putnam (1981). *Reason, Truth, and History*. Cambridge, CUP.

⁷⁷ Id.

⁷⁸ Id. at pp. 49-50.

⁷⁹ Id. at p. xi.

⁸⁰ Hilary Putnam (2004). *The Collapse of the Fact-Value Dichotomy and Other Essays*. Cambridge, Harvard University Press.

⁸¹ Putnam, *supra* note 76 at pp. 54-56.

⁸² Id. at p. xi.

⁸³ Id at pp. 107, 135.

acceptability, which are also reoccurring themes in much of legal theory, deal with the role of (ideal) justification in the making and understanding of value knowledge and truth.⁸⁴ Values, as subjective in that they exist ‘in there’ in the mind of conscious beings and not ‘out there’ as entities in the external world, are discovered through an ongoing process of justifying value positions.⁸⁵ Such a theory of value truth holds that through this epistemic process of deliberating and ‘talking’ with one’s self in justifying what moral principles and rules are the best fit in terms of reasonableness and acceptability, the knowledge that one gains from such a process can provide the right answers to most moral dilemmas.⁸⁶

4.2.3 Idealization Versus Abstraction

One of the criticism of constructive interpretation as a process for justifying the reasonableness and acceptability of one’s value positions is that it requires the postulation of ideal conditions or scenarios that create benchmarks for evaluating our moral positions against. This process of idealization can be found in most types of constructivist philosophies. It is also a prominent feature in most forms of nonpositivist theory as well. In social theory, Max Weber famously introduced the concept of ideal types;⁸⁷ and in legal theory, John Finnis uses a form of idealization through what he terms the central case.⁸⁸ In attempting to conceptualize ideal situations and ideal processes for judging actual practices, idealization allows the philosopher to make assumptions about how the evaluation of a value claim measures up to an idealized version.

Idealization is also a common feature in developing theories about what choices human agents would make under ideal conditions. This idea deals with the assumption that human actors will act rationally when justifying preferences. Such a feature is dominant in Rawlsian thought and in various rational choice theories.⁸⁹ The problem with idealization as a theoretical starting point is the observation that human agents never act perfectly rationally, and that often, they indeed act irrationally. This means that the starting point for the development of most theories that are based on the premise that human beings act rationally is demonstrably false.

⁸⁴ Id. at p. 70.

⁸⁵ Putnam, *supra* note 80 at p. 127.

⁸⁶ This is very similar to the idea of a reflective equilibrium in Rawlsian thought.

⁸⁷ Max Weber [1904](1949). *The Methodology of the Social Sciences*, translated by Edward Shils & Henry Finch. New York, Free Press, pp. 89-105.

⁸⁸ John Finnis (1980). *Natural Law and Natural Rights*. Oxford, OUP, p. 15. The idea of the central case comes from Aristotle.

⁸⁹ Rawls theory is one of ideal theory. See Rawls, *supra* note 13 at p. 216.

Onora O’Neil, an influential justice theorist, holds that rational idealization in various constructivist theories of justice are potentially dangerous because they fail to understand the vulnerabilities and limitations of human thought processes.⁹⁰ She prefers a form of abstraction as a starting point for inquiry, and explains it in the following way:

[a]bstraction, taken straightforwardly, is a matter of bracketing, but not denying, predicates that are true of the matter under discussion . . . Idealization is another matter: it can easily lead to falsehood. An assumption, and derivatively a theory, idealizes when it ascribes predicates – often seen as enhanced, ‘ideal’ predicates – that are false of the case in hand, and so denies predicates that are true of that case. For example, if human beings are assumed to have capacities and capabilities for rational choice or self-sufficiency or independence from others that are evidently not achieved by many or even by any actual human beings, the result is not mere abstraction; it is idealization.⁹¹

Notwithstanding this important distinction between abstraction and idealization, the main premise relevant to constructivist theories is its reliance on some form of idealization in the conceptualization of how human agents make choices. It demonstrates that there is an inherent flaw in measuring actual human conduct against an idealized version of it. To do so, according to such a critique, can distort the process of inquiry that human beings engage in when attempting to either invent or discover moral principles. However, the alternative is even less attractive. In the same way that the postulation of principles of justice in Rawlsian theory seems an arbitrary starting point, they are more reasonable than starting from a position of injustice. Likewise, while an idealized version of rationality as a starting point may seem irrational (because human beings do not always act rationally), it is preferable to a starting point with an idealized version of irrationality. What all of this boils down to in moral theory is an attempt to bring some coherence to theorizing about values in a way that transforms the ideas that we hold as morally valuable (subjectively) and to transmit them out in a way that holds sway over most of humanity.

For a theory of configurative fairness, many of the problems related to the issue of ideal types can be avoided. Instead of asking what principles would a plurality of agents acting perfectly rationally choose to live by; a theory of configurative fairness asks: what principles do a plurality of agents, with whatever rationality and capacities they actually have, actually choose to live by? Assumptions do not need to be made about what choices an ideal and perfectly rational set of agents would choose because a theory of configurative fairness is focused on what actual agents actually choose when subjected to a

⁹⁰ Bagnoli, *supra* note 38.

⁹¹ Onora O’Neill (1996). *Towards Justice and Virtue: A Constructivist Account of Practical Reason*. Cambridge, CUP, pp. 40-41.

set of conditions and stimuli in a Q methodology study. We do not have to idealize participants because we have actual participants to take their place.

4.3 The Ideas of John Rawls and Jürgen Habermas

This section will look at two of the most influential political and ethical thinkers of the twentieth century: John Rawls and Jürgen Habermas. They can both be seen as philosophers in the tradition of constructivist epistemology. Their work focuses on how pluralistic contemporary democracies can make political choices that can accommodate a diversity of value claims while still being able to provide a stable social structure that can exist from generation to generation. For the purposes of this work, focus will center on the Rawlsian theory of justice and Habermasian theory of communicative action. In general, the type of constructivist ethics advanced by Rawls and Habermas focus less on philosophical notions of truth and knowledge and more on political questions that attempt to convert their idealized theoretical frames into a practical approach for determining what values a plural community could all accept to live by. However, neither theorist provides a mere approach to applied morality. Instead they sought to develop a philosophical frame for justifying how their theories can produce an objectively just society.

4.3.1 John Rawls

John Rawls is often credited with reviving social contract theory in political philosophy in a manner that builds on the tradition of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. Unlike the early social contract theorists, especially Thomas Hobbes, Rawls considers the inherent nature of conscious beings as essentially cooperative, not completely self-interested and violent.⁹² Rawls uses the concept of the social contract to justify how a participatory liberal democracy could remain stable across generations without having to dictate a singular worldview.⁹³ He wanted to develop a theory that could balance between the values of liberty and equality by focusing on what processes could be established for choosing values that members of a diverse, pluralistic, and heterogeneous society could agree to as fair.⁹⁴ By focusing on the rational capacity of citizens to choose the principles and values that they would like to live by, Rawls takes a starting point that is decidedly more optimistic about human nature than the Hobbesian position. Rawls did not

⁹² Leif Wenar (2012). *John Rawls*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/archives/win2012/entries/rawls> (last accessed 1 September 2013).

⁹³ Rawls, *supra* note 14 at p. 16.

⁹⁴ *Id.* at p. 14.

progress from the position that Hobbes was wrong however; instead, he wanted to demonstrate how utilitarian conceptions of justice and social ordering failed to demark the importance of the individual as an independent rational agent.⁹⁵

Rawls theory of justice takes the starting point “most reasonable principles of justice are those everyone would accept and agree to from a fair position.”⁹⁶ To achieve this, he develops a number of concepts and thought experiments for justifying such a position. The starting point for his theory of justice as fairness is what he calls the original position.⁹⁷ In the original position, autonomous individuals select principles that will determine the basic structure of the society they will live in.⁹⁸ This choice is made behind a ‘veil of ignorance,’ which deprives participants of information about their particular position in society: for example, they will not know anything about their ethnicity, social status, wealth, gender, disabilities, or their own conception of the good.⁹⁹ From behind this ‘veil of ignorance,’ impartial and rational human agents will choose the basic principles of justice upon which to order society.¹⁰⁰ Rawls claims, that in this position, all such rational agents will choose two basic principles of justice:

1) [e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all [the liberty principle];¹⁰¹ and

2) [s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity [the fair opportunity principle]; and second, they are to be the greatest benefit of the least-advantaged members of society [the difference principle].¹⁰²

Combined, these principles of justice form the foundation of a just society from which other values and principles can be constructed and pursued. Once these fair conditions of choice have been established, then individuals in the original position can go about the business of selecting what values they would choose to live by. While it appears that, while Rawls makes no claims about the particular values that must be chosen, the two most fundamental principles of justice are not open to negotiation. He supposes that all rational and reasonable human agents would choose such constitutive principles for

⁹⁵ Rawls believed that, by conceiving the justness of a society in terms of the aggregate happiness that a particular version of human governance could achieve, utilitarianism ignored the distinctness of human individuals. See Simmonds, *supra* note 7 at p. 62.

⁹⁶ Robert Audi (1999). *Cambridge Dictionary of Philosophy*. Cambridge, CUP, pp. 774-75.

⁹⁷ Rawls, *supra* note 14 at pp. 14-18.

⁹⁸ Simmonds, *supra* note 7 at pp. 52-58.

⁹⁹ *Id.* at pp. 53-54.

¹⁰⁰ Rawls, *supra* note 14 at p. 16.

¹⁰¹ Rawls, *supra* note 14 at pp. 42-43.

¹⁰² *Id.*

constructing a just society. However, it seems reasonable (and even rational) to ask how he knows that these two principles must constitute the basic structure of society. Why for example, is a more communitarian¹⁰³ approach to justice not equally possible as a starting point for constructing a just society?

Under such a concept of the basic structure of society, Rawls holds that individuals are not only free and equal, they are also reasonable and rational.¹⁰⁴ Reasonable individuals have the capacity to abide by fair terms of cooperation, even at the expense of their own interests, provided that others are also willing to do so.¹⁰⁵ This reasonableness is what Rawls calls the capacity of all human agents to have a 'sense of justice.'¹⁰⁶ Rawls also conceives of human agents as rational: they have the capacity to pursue and revise their own view of what is valuable in life.¹⁰⁷ Rawls calls this the capacity for a 'conception of the good.'¹⁰⁸

From the two principles of justice chosen behind the 'veil of ignorance,' reasonable and rational agents have the capacity to construct a just society. Under these conditions, which he considers a fair starting point, citizens of a particular liberal society can make choices about what public values (both political and ethical) they want to live by.¹⁰⁹ While there are a number of assumptions about the inherent moral psychology of human beings in such a conception of justice, Rawls believes that inclusive opportunities to participate in choosing values that one wishes to live by can produce a stable liberal society that can persist from generation to generation despite a diversity of conflicting value claims.¹¹⁰ To justify such a position, however, he employs to additional ideas that have particular importance for a theory of configurative fairness: the idea of reflective equilibrium and the idea of an overlapping consensus.

¹⁰³ Philosophic communitarianism is the view that values and beliefs are formed in the public space through discourse and debate. It holds that the various complex traditions and institutions in any given community play a critical role in shaping the values and beliefs that individuals endorse. Communitarians criticize Rawls' "method, and suggested that appropriate conclusions about justice could only be arrived at by consulting the traditions and practices of concrete political communities." Simmonds, *supra* note 7 at p. 84. This is the critique most closely correlated with Michael Walzer (1987). *Interpretation and Social Choice*. Cambridge, Harvard University Press. "Another closely related argument attacked the metaphysical conception of the person that was said to be implicit in Rawls' theory, in so far as Rawls appears to treat persons as having an identity which is prior to any of their goals or values." Simmonds, *supra* note 7 at p. 84. This is the critique most closely correlated with the work of Michael Sandel. See Sandel, *supra* note 41.

¹⁰⁴ Rawls, *supra* note 14 at pp. 6-7.

¹⁰⁵ Simmonds, *supra* note 7 at p. 54.

¹⁰⁶ *Id.* at p. 50.

¹⁰⁷ *Id.* at p. 51.

¹⁰⁸ *Id.* at p. 54.

¹⁰⁹ Rawls, *supra* note 14 at p. 15.

¹¹⁰ Simmonds, *supra* note 7 at p. 57.

4.3.1.1 Reflective Equilibrium

The idea of a reflective equilibrium is a concept relating to how moral convictions are justified by rationally acting human beings. A reflective equilibrium is an unattainable ideal where one's moral, ethic, and political values cohere perfectly with one another. Rawls holds that:

all our judgments, whatever their level of generality – whether a particular judgment or a high-level general conviction – as capable of having for us, as reasonable and rational, a certain intrinsic reasonableness. Yet since we are of divided mind and our judgments conflict with those of other people, some of those judgments must eventually be revised, suspended, or withdrawn, if the practical aim of reaching reasonable agreement on matters of political justice is to be achieved.¹¹¹

He goes on to say:

[c]onsidered judgments of all kinds and levels may have an intrinsic reasonableness, or acceptability, to reasonable persons that persists after due reflection. The most reasonable political conception [of justice] for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view. At any given time, we cannot do better than that.¹¹²

A reflective equilibrium is essentially a method for articulating one's perspective, worldview, or viewpoint in regard to moral and ethical convictions. The process for achieving a reflective equilibrium is the manner in which rational and reasonable agents justify their convictions about value as they relate to other valued judgments. Such a view is very similar to Dworkin's theory of value unity whereby the only truth available in moral thought is that which comports with the way that all value judgments cohere with each other.¹¹³ Thomas Scanlon has said that:

it seems to me that this method [a reflective equilibrium], properly understood, is in fact the best way of making up one's mind about moral matters and about many other subjects. Indeed, it is the only defensible method: apparent alternatives to it are illusory.¹¹⁴

An example of reflective equilibrium would be to claim that one's specific political judgments, such as 'slavery is unjust,' supports more general political convictions, such as 'all citizens have basic rights,' which in turn rests on the most general and abstract beliefs that one holds – such as 'all persons are free and equal.'¹¹⁵ When all of these judgments from the most basic values to the

¹¹¹ Rawls, *supra* note 14 at p. 30.

¹¹² *Id.* at p. 31.

¹¹³ Dworkin, *supra* note 65.

¹¹⁴ Thomas Scanlon (2002). 'Rawls on Justification,' in Samuel Freeman, ed. *The Cambridge Companion to Rawls*. Cambridge, CUP, p. 149.

¹¹⁵ Wener, *supra* note 92.

most specific cohere, then one can be said to have achieved a reflective equilibrium.¹¹⁶

This method, which is conceived from the first-person perspective is ideally situated as a foundational explanation for the empirical process of mapping one's viewpoints and beliefs in Q methodology. Q methodology attempts to provide a method for empirically mirroring the process of reflective equilibrium that goes on in the mind of reasonable and rational agents. It is a method that forces the participant being measured to evaluate its subjective judgments in relation to other subjective judgments. In this way, the empirical data from a Q method study can provide a basis for configuring fairness. Such a theory claims that the process of reflective equilibrium as mapped empirically in Q methodology will evaluate one's particular beliefs, not only in relation to one's other more general beliefs, but also in relation to the other participants general and specific beliefs. If Q methodology is successful in articulating held beliefs and value positions, then that information can be used to empirically suggest what an overlapping consensus would look like.

The basic idea about the work that Q methodology can do in mapping one's reflective equilibrium and holding it still for evaluation is that particular perspectives about specific value positions and beliefs can be reconciled with participants more general beliefs. Even if participants' specific value judgments on a particular topic (or legal problem) are conflicting, it may be that those same participants have a coherent view of their more basic value positions. It is the coherence about these more basic value positions that can be used as a starting point for configuring a legal order that is acceptable to all participants in that legal order because it reflects an agreement about the underlying values that inform more specific judgments.

For example, even if there is intense disagreement about a legal rule such as the 'the application of the principle of economic necessity requires that a state applies the least restrictive measure available,' there may be less disagreement about a more general principle such as 'the application of the principle of economic necessity is a part of a state's sovereignty,' and even less disagreement about the most general principle 'sovereignty requires states to protect its citizens.' In this case, the most specific rule in international law may not be able to achieve a consensus among states, but the more general principle may be able to. If it is true that all states believe that the principle of economic necessity is an essential component of their sovereignty, then a starting point for the fair configuration of more specific rules can be based on this more general principle. The question for a theory of configurative fairness is to provide a means for determining just what the most specific rule requires if it is to gain acceptance by all of the participants to which it is directed. The claim of this work is that the application of Q methodology to a theory of

¹¹⁶ Id.

configurative fairness can help determine what the content of these specific legal rules dictate.

4.3.1.2 An Overlapping Consensus

A second important concept that is central to Rawls justice as fairness and to a theory of configurative fairness is the idea of an overlapping consensus.¹¹⁷ Such a concept is introduced in the Rawlsian theory of justice to deal with what he calls the fact of reasonable pluralism. He claims that:

the diversity of religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away. It is a permanent feature of the public culture of democracy. Under the political and social condition secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable yet reasonable comprehensive doctrines will come about and persist, should it not already exist. This fact about free societies is what I call the fact of reasonable pluralism.¹¹⁸

Given that there will never be a single comprehensive doctrine that will exist in minds of citizens in a pluralistic society, one needs a mechanism for understanding how a plurality of diverse comprehensive doctrines can coexist in a free society. This mechanism is the idea of an overlapping consensus. An overlapping consensus holds that the constitutive values that make up the basic building blocks of a particular social order can overlap among members of that order in a manner that allows for a diversity of opinions and viewpoints on particular claims to value.¹¹⁹ Members of such an order attempt to justify their particular outlook as in equilibrium with the more basic views of that society.¹²⁰

The idea of an overlapping consensus relates closely to the idea of the goal value in the New Haven school of jurisprudence that seeks to provide a basis for a minimum world order of human dignity.¹²¹ According to the New Haven account, a value-orientated jurisprudence can be configured in a manner that provides a minimum level of structure upon which particular value claims can be pursued in a reasonable discourse. The idea of an overlapping consensus in jurisprudential thought can be seen as a constitutive procedure that sets the baseline for developing legal rules that are acceptable to its participants despite the fact that the participants in a particular legal order represent a diversity of comprehensive doctrines, worldviews, perspectives, and

¹¹⁷ John Rawls (1987). *The Idea of an Overlapping Consensus*. Oxford Journal of Legal Studies. Vol. 7, p. 1.

¹¹⁸ Rawls, *supra* note 14 at p. 33.

¹¹⁹ Rawls, *supra* note 117 at pp. 2-3.

¹²⁰ *Id.*

¹²¹ See Chapter 4, Section 4.

viewpoints. This is a feature that underscores most process-based legal theory whereby a system of procedural justice (fair process), if properly constructed or configured, can result in legal rules that are acceptable to participants using that legal order. Prominently, this is the claim of Thomas Franck who stated that:

[w]hat the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective; not as St. Thomas Aquinas hoped, a divine ‘given’ inculcated into the nature of things to be intuited by right-thinking humans. It is, instead, a human, subjective, contingent quality which merely captures in one word a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula located at the conceptual intersection between various plausible formulas for allocation. Fairness discourse requires the reasoned pursuit of what John Rawls has identified as ‘the idea of an overlapping consensus.’¹²²

For a theory of configurative fairness, the idea of an overlapping consensus is not limited to the establishment of a fair process for determining legal rules as the end of legal inquiry. Rather, a theory of configurative fairness is also concerned with the actual substantive content of the legal rules, norms, and principles that are agreed to after entering into such a fair process. The idea of an overlapping consensus in a theory of configurative fairness is not an abstract theoretical tool for understanding how a diversity of participants can mutually agree to a chosen legal configuration according to their own worldview. Instead, it is a method for analyzing the actual choices that participants make according to their own perspective or outlook. The goal of such an analysis, which is the product of empirical data provided by a relevant Q methodology study, is to identify patterns of overlap among conflicting or competing perspectives on specific substantive rules, norms, or principles in a given legal order. The idea of an overlapping consensus according to such a goal is to identify when and if it is possible for a diversity of value claims to be configured in a manner that leads to a value distribution that is acceptable to all participants in that legal order despite seemingly conflicting value claims and orientations.

4.3.2 Jürgen Habermas

Another important political philosopher of the late twentieth century is Jürgen Habermas. In many ways, the ideas of Rawls and Habermas are compatible. They both orientate their philosophy in the context of the modern democratic state. They are both concerned with how a fair process can effectively deliver a just society. They both write from an idealized perspective, but at the same time gear such an idealization for practical application as a means for

¹²² Franck, *supra* note 26 at p. 32.

addressing real problems. Both theorists believe that autonomous and rational human agents are capable of understanding moral and ethical truth as a process of justification, deliberation, reflection, contemplation, and argumentation. They are both largely indebted to the fundamental ideas of Kantian thought. Where these two thinkers begin to part course, however, relates to the level of social interaction and communication required to achieve their respective understandings of proper inquiry. For purposes of our inquiry here, it is Habermas's theory of communicative action and his discourse ethics that are of most interest.

Where Rawls is more concerned with the dialogue that one has with one's self (that is, the deliberative process for achieving a reflective equilibrium), Habermas focuses on how the dialogue, discourse, and communication between rational agents can produce a justification for moral, ethical, political, and legal values that can be accepted by those participating in such a discourse.¹²³ The major distinction here is that Rawls can be seen as endorsing the view that people are completely independent and form their belief and value systems more or less in isolation. When they arrive at the original position, they intuitively hold some values that are inherent in all human agents. From this position, rational agents deliberate and agree to what basic principles they could live by. Habermas on the other hand holds that it is the actual process of discourse and communication that constructs moral and ethical truth.¹²⁴ This is a view that is compatible with a school of thought in social psychology called symbolic interactionism.¹²⁵ Without going into much detail about such a view, its relevance for Habermas and for this work lies in the claim that moral epistemology is not gained through knowing a Kantian categorical imperative that is available a priori; rather, it is gained through an ongoing process of argumentation and deliberation with other rational agent in what Habermas calls a rational discourse.¹²⁶

His theory of communicative action is an attempt to conceptualize a description of cooperative actions based on mutual communication of deliberation and argumentation.¹²⁷ Communicative action is possible given the human capacity to reason. However, he claims that this understanding of rationality is "no longer tied to, and limited by, the subjectivistic and

¹²³ Jürgen Habermas (1998). *The Inclusion of the Other: Studies in Political Theory*, edited by Ciaran Cronin & Pablo de Greiff. Cambridge, MIT Press, p. 40.

¹²⁴ James Bohman & William Rehg (2011). *Jürgen Habermas*. Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/archives/win2011/entries/habermas> (last accessed 1 September 2013).

¹²⁵ Symbolic Interactionism is a social theory that focuses on the analysis of the patterns of communication, interpretation and adjustment between individuals. The theory is a framework for understanding how individuals interact with each other and within society through the meanings of symbols.

¹²⁶ Bohman & Rehg, supra note 125.

¹²⁷ Id.

individualistic premises of modern philosophy and social theory.”¹²⁸ Instead, he claims that our rationality is bound up in our ability to communicate, through language, and to engage in argumentation.¹²⁹ He states that:

we use the term argumentation for that type of speech in which participants thematize contested validity claims and attempt to vindicate or criticize them through argumentation.¹³⁰

Communicative action is the process whereby two or more individuals interact and coordinate their shared, intersubjective understandings of the interpretations of particular situations.¹³¹ The process for reaching agreement on moral and ethical claims is gained through communicative argumentation between rational agents.¹³² Instead of two or more individuals coming to a situation with their respective world view and comprehensive doctrines and then trying to sort out what principles they could agree to through some sort of compromise, a theory of communicative action claims that the actual views that one holds in regard to moral and ethical dilemmas is constructed by the process of argumentation and justification itself.¹³³

By conceptualizing moral epistemology in this way (as an ongoing process of communication), Habermas is able to situate himself within the traditions of moral psychology and social anthropology by holding that this ongoing process is the means by which human morality develops.¹³⁴ Morality is not preordained; it is the outcome of identity formation that is rooted in mutual recognition.¹³⁵ Knowledge is an inherently social enterprise that requires engagement with other human beings.¹³⁶ Accordingly, Habermas is demonstrating through his theory of communicative action that value knowledge:

requires participants to attend to the values and interests of each person as a unique individual; conversely, each individual conditions her judgment about the moral import of her values and interests on what all participants freely accept. Consequently, moral discourse is structured in a way that links moral validity with solidaristic concern for both the concrete individual and the morally formative communities on which her identity depends.¹³⁷

¹²⁸ Jürgen Habermas (1984). *A Theory of Communicative Action*, translated by Thomas McCarthy. Boston, Beacon Press, p. vi.

¹²⁹ Id. at p. 18.

¹³⁰ Id.

¹³¹ Id. at p. 86.

¹³² James Finlayson (2005). *Habermas*. Oxford, OUP, p. 102.

¹³³ Id.

¹³⁴ Bohman & Reh, *supra* note 125.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

Influenced by the work of George Mead,¹³⁸ Habermas develops a theory called discourse ethics whereby moral and ethical knowledge is the process of practical discourse between rational agents.¹³⁹ His discourse theory builds on his theory of communicative action and grounds ethical and moral knowledge as the product of ongoing social interaction and communication between rationally autonomous agents.¹⁴⁰ To put such a concept into practice, he states his discourse principle as:

only those action norms are valid to which all possibly affected persons could agree as participants in rational discourse.¹⁴¹

In addition to the so-called discourse principle, Habermas articulates a dialogical principle of universalization, which he states as:

a [moral] norm is valid if and only if the foreseeable consequences and side effects of its general observance for the interests and value-orientations of each individual could be freely and jointly accepted by all affected.¹⁴²

While this view is basically a consensus theory of truth, it is problematic in the same way that Rawlsian theory is. How do we know that uncoerced acceptance of a particular norm by all those who are affected by it will necessarily result in proof that such a consensus is ontologically true. Are we not sometime (often) mistaken in our views and that the process of social mimicking or social tradition could lead us to agree to a particular moral norm even though it may be false in the ontological sense? The answer that Kant, Habermas, and Rawls would all give to this skepticism is that it is the capacity of reason to know value truth that would prevent such a misguidance over time. This view is an unabashed optimism about the possibilities of human reason.

It is not a view that a theory of configurative fairness necessarily supports, nor does it have to. As indicated in previous sections, the goal of a theory of configurative fairness is to gain knowledge about the norms that rational actors will accept, it does not need to prove that such an acceptance produces absolute truth about such norms. Regardless of the potential metaphysical instability of Rawlsian and Habermasian theory, the importance of their theories lies in an understanding of social stability that is not stagnant, but is constantly susceptible to change and revision over time. Both Rawls and

¹³⁸ George Mead was a classic pragmatist and psychologist whose work anticipated much of the process-based thinking in philosophy and sociology that dominates contemporary thought. Habermas takes much of his insight on the universifiability of moral behavior from Mead. See Finlayson, *supra* note 132 at p. 83.

¹³⁹ *Id.* at pp. 79-80.

¹⁴⁰ *Id.* at p. 85.

¹⁴¹ Jürgen Habermas (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg. Cambridge, MIT Press, p. 107.

¹⁴² Habermas, *supra* note 123.

Habermas are able to accommodate such indeterminacy by focusing on the process and not the rules. It is for this reason that their theories are likely to remain influential so long as the ideas of postmodernity persist in the social sciences.

5. CONSTRUCTIVISM IN LAW AND INTERNATIONAL LAW

As argued at earlier points in this Chapter and in earlier Chapters of this work, constructivism in law has strong roots in almost every process-based conceptualization of jurisprudence that has developed over the past half century. The basic claim of all of these theories – although they come in myriad iterations – is to hold that a proper jurisprudence must view law as a process. The law is then constructed through such a process. Debate among the various constructivist or process-based approaches often focuses on differences in just how this process ought to be understood and structured. For many, especially in the Anglo-American tradition, this process is geared specifically at how judiciaries ought to make decisions: they are theories of adjudication about the process that is appropriate for judges to interpret and make law through judicial decisions. One of the key features of legal constructivism, regardless of the specific subject-matter that a particular theory aims, is that law is a process of communication:

law is communication and nothing but communication . . . [l]egal communications are the cognitive instruments by which the law as social discourse is able to ‘see’ the world.¹⁴³

In international law, constructivist theories are specifically tied to understandings of the law that are associated with this process of legal communication as a whole. This includes both the making and the adjudication of the law. Among these approaches, the New Haven school of jurisprudence was the first to conceptualize international law as an ongoing process of communication leading to authoritative and controlling decision. Much of Harold Lasswell’s communication theory¹⁴⁴ is evident in the New Haven school; and in the early 1980s, Michael Reisman further refined the New Haven school through the development of what he called a theory of law as a process of communication.¹⁴⁵ In the 1990s, Harold Koh’s transnational legal process,¹⁴⁶ Anne-Marie Slaughter’s liberal theory,¹⁴⁷ and Thomas Franck’s

¹⁴³ Gunther Teubner (1989). *How the Law Thinks: Toward a Constructivist Epistemology of Law*. Law & Society Review. Vol. 23, pp. 727, 739-40.

¹⁴⁴ See Harold Lasswell (1948). ‘The Structure and Function of Communication in Society,’ in Lyman Bryson, ed. *The Communication of Ideas*. New York, Harper & Row; Harold Lasswell (1927). *Propaganda Technique in the World War*. Gloucester, Peter Smith.

¹⁴⁵ Michael Reisman (1981). *International Lawmaking: A Process of Communication*. American Society of International Law Proceedings, Vol. 71, p. 101.

¹⁴⁶ Harold Koh (1996). *Transnational Legal Process*. Nebraska Law Review. Vol. 75, p. 181.

fairness discourse theory¹⁴⁸ can all be seen as additions to a constructivist understanding of international law. However, one theory that is particularly impressive in this regard is the constructivist account of international law developed by Jutta Brunnée and Stephen Toope.¹⁴⁹ Like other constructivist and process-based theories of law, they hold that law is an ongoing process of interaction. What is novel about their account is that it provides a descriptive understanding of such a process that does not turn exclusively on sovereign authority and control.¹⁵⁰

One of the additional components that is evident in postmodern legal constructivist approaches to international law is its influence on, and influence from, constructivist moves in international relations theory. Primarily marked as a reaction to various rational choice theories in international relations, constructivist theories have become a dominant force in international relations theory following a seminal article by Alexander Wendt in 1992.¹⁵¹ His theory of social construction holds that identity formation is just that; it is formed or constructed, and the way that such state identities are formed (and the choices that they make) is not exclusively tied to material interests.¹⁵² They are also formed by ideas and norms. Such a conceptualization of state behavior shifted the discourse on what constitutes an interest for states, and how international law and norms shape the way that their identities are actually formed. Instead of assuming, as the rational choice theorists do, that state identities are based on material capabilities exclusively (and that choices are made in rational self-interest), constructivist international relations theorist have been able to compellingly demonstrate that state identities are malleable, that they are shaped by norms and ideas, and that they are influenced by the social interaction of states over time.¹⁵³

¹⁴⁷ Anne-Marie Slaughter (2005). *A New World Order*. Princeton, Princeton University Press.

¹⁴⁸ Franck, *supra* note 26.

¹⁴⁹ See Jutta Brunnée & Stephen Toope (2010). *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge, CUP.

¹⁵⁰ An important aspect of their approach relates to the interaction at the international level between states and nonstate actors in constructing law. Instead of looking at formal sources of state-based law at the international law, Brunnée and Toope look to understanding the bindingness of law according to the shared expectations about legality among all types of actors working at the international level. Their theory provides evidence for ways that shared expectations about international legality can be obtained in international discourse even when a particular rule or procedure does not meet the mandate of traditional or conventional sources of international lawmaking. *Id.*

¹⁵¹ Alexander Wendt (1992). *Anarchy is What States Make of It: the Social Construction of Power Politics*. International Organizations. Vol. 46, p. 391.

¹⁵² Steinberg & Zasloff, *supra* note 27 at p. 82.

¹⁵³ Wendt, *supra* note 151 at p. 417.

6. CONFIGURING FAIRNESS IN LEGAL DECISION AND DISCOURSE

A theory of configurative fairness is a participant-orientated and communicative process of social interaction that, if successful, can lead to an overlapping consensus or agreement about the values and norms that constitute a particular international legal order. It is a theory that falls within the constructivist and pragmatist philosophical traditions. It attempts to provide a method for clarifying and grounding mutually agreed values that form the foundation of any legal order. It holds that the fairness of any law is a perception that is orientated towards its participants. To achieve fairness, the law must be configured in a manner that is built on values, norms, and principles (shared subjectivities) that are acceptable to all those to which the legal order is aimed.

As a method for determining a proper value configuration, a theory of configurative fairness has practical implications through the application of Q methodology. The theory is built on the premise that, despite the subjectivity of value, perspectives can be analyzed and interpreted through the use of Q methodology (as shared perspectives); and that the results of a Q method study can provide sophisticated empirical insight into the value perspectives that participants in a particular legal order have. This empirical information will be able to show where there are divergences and convergences among the different subjective value perspectives that participants using the legal order have. Where there is some level of convergence among value perspectives, fair laws can be configured around these values that are representative of an overlapping consensus.

In developing a theory of configurative fairness, a distinction between legal decision and legal discourse has been identified in order to clarify the purpose of each form of inquiry. This is very similar to the importance given to the observational standpoint in the New Haven school of jurisprudence whereby the role of the decisionmaker and the discourser (scholar in their parlance) are distinct and should be understood as such.¹⁵⁴ For a theory of configurative fairness, the focus on the interactional understanding of social action and the discursive possibilities that the reflective communication of rational and reasonable perspectives can have on the development of the law remains the focus. The basic claim is that this ongoing communicative discourse influences and motivates the way that particular legal orders evolve over time.

In order for laws to develop in a manner that are perceived as fair by the participant users of that regime, legal rules and procedures must comport with what these participants consider to be a fair. However, if such a conception is limited to mere self-interest, it could just as likely be considered unfair by similarly situated individuals. This is generally how hierarchical

¹⁵⁴ See Chapter 4, Section 4.3.1.

systems of law develop. They give one-sided power to certain individuals and none to others. Under such a system, legal orders develop as one-sided and therefore, there is always a need to maintain support for such a system by reinforcing it through threats of coercion and violence by the powerful against the impotent. Since such a system is an ideal formula for creating revolutions, it is not a sustainable option in contemporary life.

Instead, a theory of configurative fairness requires the constant discourse between the powerful and the powerless; it requires acceptance of both the lawmakers and the lawtakers of any given legal order in order for the law to be considered as fair. This is the best way to maintain the long-term stability of any legal regime. The way that laws are considered fair is if they are compatible with the value perspectives of those bound by the legal obligations that such a legal order creates. But because the law is constantly changing and evolving, a fair legal order at a specific point in time is not enough for long-term legal stability. Rather, a fair legal order must be able to evolve and develop over time. This requires a constant discourse among participants. Only if this inclusive communicative process is working can a fair, but evolving set of legal rules and procedures, be maintained.

CHAPTER 6

Q METHODOLOGY AND LEGAL ANALYSIS

1. INTRODUCTION

Q methodology is a theory and methodological technique developed for the empirical measurement of first-person, and thus subjective, viewpoints or perspectives. The connection between a theory of configurative fairness and Q methodology is derived from the capacity of this empirical methodology to shed light on subjective value perspectives in constituting what users of a particular legal order would consider to be a fair distribution of their value claims, demands, and expectations. A theory of configurative fairness is a nonpositivist theory about law that is rooted in the idea that legal orders that are perceived as fair, and are thus viewed as legitimate, require knowledge about the right distribution of the values that participants and decisionmakers endorse. A theory of configurative fairness holds that, from a regime-building perspective, evolving legal orders develop according to the underlying values that are endorsed by both the discourses who shape and influence the legal rules of a particular legal system, and by the decisionmakers who have the authority and legitimacy to make and apply the law.

Such a view holds that the law serves an object and purpose. It is a means to an end. However, this is not to say that the law is purely instrumental; rather, it is a claim that the legitimacy and authority of the law is derived from the service it provides in regulating human conduct. This regulation is a human choice that is encapsulated in the system of legal rules and procedures that legal decisionmakers create. These choices, if fair, are the product of the underlying value claims that a legal community (participants) would accept as binding. The development of any legal system is fair and legitimate if it appropriately reflects the values to which a particular legal community agrees. The problem, of course, for any nonpositivist or value-laden theory about law lies in explaining just how these value claims, demands, and expectations (perspectives) can ever be objectified given their subjective nature and structure. The particular challenge for a theory of configurative fairness is whether or not a method exists for converting subjective value knowledge into objective legal knowledge. Q methodology has the potential to be this tool.

However, objectifying value knowledge in the context of legal knowledge has always been problematic. For example, if value knowledge cannot be empirically verified and objectified, it is quickly labeled subjective in its negative sense: arbitrary, biased, mere preference or opinion. To overcome this negative connotation, subjective claims about value preferences must carry an objective weight. One way to address this problem in legal philosophy is to

claim that particular values are capable of universal application and are thus considered objective. However, in both moral and legal philosophy, the universalization of moral, political, ethical, or cultural values is largely considered an inaccurate and outmoded means for objectifying the values that inform the development of any legal order. Such a view about an objective and universal set of values that all human beings must value is a project rooted primarily in a Newtonian or modernist worldview holding that truths are not only possible, but that they exist as universal mandates.

For the last one hundred years, however, the quantum revolution and the move to postmodernism in the social sciences has transformed the basis for epistemic truths. Instead of holding that universal truths about value are inherently possible, the postmodern view is that value knowledge is subjective, contextual, and relative. To bring order to such subjective knowledge, the postmodern world requires a method for looking at value perspectives in a first-person, contextual, and relative frame of inquiry. It is claimed that Q methodology is ideally situated for transforming this kind of subjective value knowledge into objective legal knowledge. It does this by mapping individual perspectives and factor analyzing the results in a way that can provide objective knowledge about any type of subjective knowledge.

From a regime-building perspective, a theory of configurative fairness focuses on the collection of subjective, first-person value knowledge from all of the participants subject to a particular legal order. In cases where it is easy to identify that there is a value consensus endorsing a legal rule, the work of a legal decisionmaker is relatively straightforward. Where there is considerable disagreement about the value claims of a particular legal community, the decision about which value claims become authoritative and controlling legal rules is considerably more difficult. It is these more difficult scenarios where it is claimed that Q methodology can contribute. Q methodology provides an empirical basis for understanding and analyzing the underlying values that inform and motivate various legal positions and doctrines.

The idea that subjective perspectives, perceptions, and viewpoints about particular values can be measured with a strong degree of objective certitude will of course be viewed with some degree of skepticism. Yet, this is precisely what Q methodology can do. Q methodology is a composite of philosophical inquiry, empirical research procedures, and psychometric methods that yields perhaps the most sophisticated foundation for the examination of human subjectivity: a methodological approach for the systematic study of an individual's viewpoints, perceptions, beliefs, perspectives, motivations, goals, orientation, attitudes, and preferences.¹ Q methodology is a form of statistical

¹ Stentor Danielson, et al. (1999). *Using Q Method to Reveal Social Perspectives in Environmental Research*, Social and Environmental Research Institute, available at: www.seri-us.org/pubs/Qprimer.pdf (last accessed 1 September 2013).

analysis with roots in traditional factor analysis. The basic method combines the gathering of data (usually subjective statements on a particular topic) in the form of Q sorts and then correlates this data using a form of factor analysis. A well-conducted Q method study will provide quantitative data on the various subjective viewpoints that emerge from those participating in any particular Q method study.

This Chapter aims at distilling the important features of the theoretical underpinnings of Q methodology as well as the technique employed in a Q methodological study. It also aims at identifying the linkages between Q methodology and legal theoretical frames that are nonpositivist in orientation. The basic claim is to identify how Q methodology can provide an empirical foundation and addendum to legal theories holding that value positions matter in understanding how legal orders develop, but nonetheless cannot meet the objective mandate of most positivist frames of legal inquiry and are thus marginalized as descriptively impotent in explaining law as law: that is, distinct from morality or any other form of valuation. Linking Q methodology to jurisprudential thought is aimed at overcoming this problem in legal theoretical outlooks.

2. THE THEORETICAL UNDERPINNINGS OF Q METHODOLOGY

Invented by William Stephenson in 1935 in the form of a short letter² to the scientific journal, *Nature*, Q methodology developed out of Stephenson's interest in using factor analysis to correlate people with the views they held in order to reveal the multiple points of view that could prevail in any situation. Stephenson was a British physicist-psychologist with doctorates in both disciplines, earning his degree in psychology while serving as the last graduate assistant to Charles Spearman, the inventor of factor analysis.³ His book, *The*

² "Factor analysis is a subject upon which Prof. G. H. Thomson, Dr. Wm. Brown and others have frequently written letters to *Nature*. This analysis is concerned with a selected population of n individuals each of whom has been measured in m tests. The $(m)(m - 1)/2$ intercorrelations for these m variables are subjected to either a Spearman or other factor analysis. The technique, however, can also be inverted. We begin with a population of n different tests (or essays, pictures, traits or other measurable material), each of which is measured or scaled by m individuals. The $(m)(m-1)/2$ intercorrelations are then factorised in the usual way. This inversion has interesting practical applications. It brings the factor technique from group and fieldwork into the laboratory, and reaches into spheres of work hitherto untouched or not amenable to factorisation. It is especially valuable in experimental aesthetics and in educational psychology, no less than in pure psychology. It allows a completely new series of studies to be made on the Spearman 'central intellectual factor' (g), and also allows tests to be made of the Two Factor Theorem under greatly improved experimental conditions. Data on these and other points are to be published in due course in the *British Journal of Psychology*." William Stephenson (1935). *Technique of Factor Analysis*. *Nature*. 24 August 1935, p. 297.

³ Spearman once referred to his protégé, William Stephenson, as the most creative statistician in psychology. However, Stephenson's methodology, despite its creativity, was vigorously challenged in psychological circles for decades. Only in the last two decades has widespread use of his methodology entered the social sciences as a legitimate and accurate method for

Study of Behavior: Q-Technique and Its Methodology,⁴ is the most thorough statement on his innovation, and has been applied to a wide variety of disciplines: from psychology to political science, economics, public policy, marketing, and communication.⁵ Q methodology seeks to provide both a qualitative and quantifiable analysis of human subjectivity, with self-referential meaning and interpretation being central.⁶ As will be explained in the subsequent Sections, it is this aspect of Q methodology that differentiates it from the other types of factor analysis being espoused.⁷

Therefore, while Q methodology focuses on the qualitative (in the sense that it is individual perspectives that are the focus of inquiry) and not the quantitative (as in traditional factor analysis), some of the most statistically rigorous mathematics of factor analysis are operating in the background.⁸ Q methodology has been described as a method that “combines the strengths of both qualitative and quantitative research traditions.”⁹ It is a method that provides researchers with a systematically and rigorously quantitative means for examining human subjectivity.¹⁰ Human subjectivity is defined as, for the purpose of this methodology, a person’s perspective on a matter of social or personal importance or relevance.¹¹

A person’s subjective perspective or viewpoint is the cognitive representation that an individual makes of the external reality and his or her position in that reality.¹² The corollary to this conception of subjectivity, which makes it amenable to analysis, is that subjective viewpoints or perceptions are communicable and are always advanced from a position of self-reference.¹³ Q methodology is a method that can lend an objective analysis to this kind of operant subjective communicability.¹⁴ In the process of Q sorting, the person

measuring human subjectivity. See Steven Brown (1995). *The History and Principles of Q Methodology in Psychology and the Social Sciences*. British Psychological Society Symposium, ‘A Quest of for a Science of Subjectivity: The Lifework of William Stephenson.’ 12-14 December 1997. London, University of London.

⁴ William Stephenson (1953). *The Study of Behavior: Q-Technique and Its Methodology*. Chicago, University of Chicago Press.

⁵ Stephen Brown (2007). ‘Q Methodology,’ in Lisa Given, ed. *The Sage Encyclopedia of Qualitative Research Methods*. London, Sage, p. 699.

⁶ Id.

⁷ Traditional factor analysis, called R methodology, correlates variables (tests). Q methodology, on the other hand, correlates persons. See Section 2.1 of this Chapter.

⁸ Steven Brown (1993). *A Primer on Q Methodology*. Operant Subjectivity. Vol. 16, pp. 91, 94.

⁹ Karen Dennis & Andrew Goldberg (1996). *Weight Control Self-Efficacy Types and Transitions Affect Weight-loss Outcomes in Obese Women*. Addictive Behaviors. Vol. 21, pp. 103, 104.

¹⁰ Brown, supra note 5.

¹¹ Bruce McKeown & Dan Thomas (1993). *Q Methodology: Quantitative Applications in the Social Sciences*. London, Sage, p. 12.

¹² Thomas Metzinger (2004). *The Subjectivity of Subjective Experience: A Representationalist Analysis of the First-Person Perspective*. Networks. Vol. 3, pp. 33, 38.

¹³ McKeown & Thomas, supra note 11.

¹⁴ The idea of operantcy “can be traced to Skinner [the American behaviorist], and before that to Spearman [inventor of factor analysis], who were on the trail of this idea even before it became a central principle in physics. Science deals with operations associated with confrontable events,

operates with statements or other measurable stimuli by ranking-ordering them under some experimental condition.¹⁵ This operation:

is subjective inasmuch as it is *me* [first-person] rather than someone else [third-person] who is providing a measure of *my* point of view, and the factors which emerge are therefore categories of *operant subjectivity* [emphasis in original].¹⁶

As such, Q methodology can be very helpful in exploring and understanding individual preferences, motivations, and perceptions; that part of human cognition, which has great influence on behavior, but often remains unobservable.¹⁷ Typically, in a Q methodology study, individuals are presented with a sample of statements about some topic, called the Q set.¹⁸ The individuals giving responses, called the P set, are asked to rank order the statements.¹⁹ The sorting of the statements is done from the individual's own point of view, and it is this process that brings subjectivity into play.²⁰ This method is called the Q sort, and the statements are always matters of so-called subjective opinion, not objective fact.²¹ By giving their subjective meaning to the statements, the ranking of the Q sort statements can reveal individual subjective viewpoints on a topic.²² These individual rankings are then subject to factor analysis, called the Q analysis; and the resulting factors, in as much as they have arisen from individual subjectivities, indicate the convergence or divergence of themes that exist among these individuals.²³

Therefore, Q method differs from other forms of qualitative research methods, such as surveys or questionnaires, which often impose antecedent conditions on the respondent. For example:

[s]tudies using surveys or questionnaires often use categories that the investigator imposes on the responses. Q, on the other hand, determines categories that are operant.²⁴

and in Q methodology self and subjectivity are rendered operational through Q technique. In the process of Q sorting, the person operates with statements or other measurable stimuli by rank-ordering them under some experimental condition. The operation is subjective inasmuch as it is *me* rather than someone else who is providing a measure of *my* point of view, and the factors which emerge are therefore categories of *operant subjectivity* [emphasis in original].” See Brown, *supra* note 3 at p. 3.

¹⁵ Job van Exel & Gjalte de Graaf (2005). *Q Methodology: A Sneak Preview*, available at: <http://qmethod.org/articles/vanExel.pdf> (last accessed 1 September 2013).

¹⁶ Brown, *supra* note 8 at p. 12; see also William Stephenson (1977). *Factors as Operant Subjectivity*. Operant Subjectivity. Vol. 1, p. 3.

¹⁷ van Exel & de Graaf, *supra* note 15 at p. 2.

¹⁸ McKeown & Thomas, *supra* note 11.

¹⁹ *Id.*

²⁰ Brown, *supra* note 8 at pp. 93-94.

²¹ *Id.*

²² Danielson, *supra* note 1 at p. 9.

²³ *Id.* at pp. 10-11.

²⁴ van Exel & de Graaf, *supra* note 15 at p. 1.

A strength of the method is that it does not require shared perspectives, or groups of subjects that share them, to be known or hypothesized in advance:²⁵

[a] crucial premise of Q is that subjectivity is communicable, because only when subjectivity is communicated, when it is expressed operantly, it can be systematically analysed, just as any other behavior.²⁶

While there are other methods for evaluating perspectives and viewpoints on particular issue areas,²⁷ Q methodology has emerged in the past few decades as the most scientifically rigorous method for measuring human subjectivity.²⁸

2.1 Q Methodology Versus R Methodology

Statistically speaking, Q methodology is a form of factor analysis. However, its method differs in many ways from traditional factor analysis, called R methodology. R methodology is the term coined by William Stephenson to categorize all methods of factor analysis where variables or tests, not persons, are the subject of correlation.²⁹ The R comes from Karl Pearson's product-moment correlation coefficient (called Pearson's *r*), which is used to denote the measure of the correlation between two variables.³⁰ On the other hand, the Q in Q methodology comes from GH Thompson, a British psychologist, who referred to the term Q for any form of factor analysis that attempted to derive correlations between persons, as opposed to tests or variables – as in R methodology.³¹ As will be described subsequently, it is this basic distinction that differentiates Q methodology from R methodology. R methodology correlates variables, while Q methodology correlates persons.

Essentially, Q methodology is an inversion of R methodology in terms of what is the object of correlation.³² In Table 1 below, for example, the variables are in

²⁵ G Raadgever, et al. (2008). *Identification of Stakeholder Perspectives on Future Flood Management in the Rhine Basin Using Q Methodology*, Hydrology & Earth System Sciences. Vol. 5, pp. 437, 439.

²⁶ van Exel & de Graaf, supra note 15 at p. 2.

²⁷ These methods include, inter alia: surveys, focus groups, multiattribute utility analysis, repertory grid method, grounded theory method, and mental model mapping. See Toddi Steelman & Lynn Maguire (1999). *Understanding Participant Perspectives: Q Methodology in National Forest Management*. Journal of Policy Analysis and Management. Vol. 18, pp. 361, 362; see also M Kolkman, et al. (2005). *Mental Model Mapping as a New Tool to Analyze the Use of Information in Decision-Making in Integrated Water Management*. Physics & Chemistry of the Earth. Vol. 30, p. 317.

²⁸ Brown, supra note 5.

²⁹ Stephenson, supra note 2.

³⁰ Steven Brown (1980). *Political Subjectivity: Applications of Q methodology in Political Science*. New Haven, Yale University Press, p. 9.

³¹ Id.

³² The inversion that Stephenson alludes to in this letter to Nature relates to his desired focus on the correlation of persons, not traits. He discovered very quickly that merely turning the data matrix on its side would produce statistically dubious results. See Stephenson, supra note 3.

the columns, while the persons tested make up the rows in the data matrix. This is the basic matrix for a R methodological study where the focus is on the variables in the columns. However, this data matrix can also be inverted.³³ In such an instance, the persons are moved into the columns and the variables are presented as rows. Any methodological approach in correlation statistics that focuses on correlating the persons tested versus the variables themselves are referred to as Q.³⁴ However, it is this distinction between Q and R that has led to a large amount of methodological confusion.³⁵ This is because a simple inversion of the data matrix gives statistically dubious results, and therefore, the kind of Q methodology that Stephenson advocated is actually nothing like a basic inversion of R methodology.³⁶ Instead, it envisions a complete retool of the data used in the analysis.³⁷ Stephenson's form of Q retains only the basic distinction: Q method focuses on correlations between persons, not tests or variables.

Table 1: Data Matrix for R Factor Analysis

Persons	Variables (Tests)				
	1	2	3	4	<i>m</i>
<i>a</i>	ax1	ax2	ax3	ax4	axm
<i>b</i>	bx1	bx2	bx3	bx4	bxm
<i>c</i>	cx1	cx2	cx3	cx4	cxm
<i>d</i>	dx1	dx2	dx3	dx4	dxm
<i>n</i>	nx1	nx2	nx3	nx4	nxm

Traditional factor analysis – R methodology – is able to identify latent variables (called factors) that exist in the relationship between traits.³⁸ Under traditional factor analysis of the type Spearman invented, correlations could be made between various tests. It is a method of correlation statistics. For example, say that a researcher has a set of data that consists of a series of tests (variables) that individuals have conducted relating to verbal ability, mathematical ability, and problem-solving ability.³⁹ These tests can be standardized (explained in the following paragraph) and then correlated to see if there are any underlying latent factors that explains statistically significant similarities and differences between the scores.⁴⁰ Under such an example, one might find that high scores on the verbal test would correlate with similarly high scores on the

³³ Simon Watts & Paul Stenner (2012). *Doing Q Methodological Research: Theory, Method, and Interpretation*. London, Sage, p. 12.

³⁴ Brown, *supra* note 30 at p. 11.

³⁵ Watts & Stenner, *supra* note 33 at pp. 12-13.

³⁶ Brown, *supra* note 30 at p. 11.

³⁷ Watts & Stenner, *supra* note 33 at pp. 15-16.

³⁸ Brown, *supra* note 30 at p. 12.

³⁹ Watts & Stenner, *supra* note 33 at p. 10.

⁴⁰ *Id.*

mathematical and problem-solving tests.⁴¹ At the same time, one might also discover that a low score on one of the tests, also correlates with a low score on the other two tests.⁴²

In essence, factor analysis is a type of data reduction technique:

that delivers on this reductive promise by isolating groups of variables – traits, abilities and so on – exhibiting measured scores that have varied proportionately (or covaried) across a population of persons.⁴³

In the example given, the variables given (the three tests) are likely to covary. In probability theory and statistics, covariance is a measure of how much random variables change together.⁴⁴ If the greater value of one variable corresponds or correlates with a greater value of another variable, then the covariance is a positive number. Likewise, if a greater value of one variable corresponds or correlates with a lesser value of another variable, then the covariance is a negative number. Covariance shows the tendency of a linear relationship between two or more variables. In the case given:

this covariation suggests that the three variables might, in fact, be better understood as alternative manifestations of a single underlying or latent factor.⁴⁵

An observed positive association or correlation between the scores of verbal, mathematical, and problem-solving aptitude tests may be understood on the basis of a single latent factor such as intelligence.⁴⁶ As such, factor analysis is able to reduce a large set of variables down to a small number of factors that can explain the covariance.

Under traditional factor analysis, a population of individuals are measured according to a set of multiple variables. It is these variables that are the primary focus in this type of factor analysis. To put the project of factor analysis into context, take a modified example drawn from Watts and Stenner:⁴⁷ in Table 1 above, for example, Variable 1 could be a test for height, Variable 2 could be a test for weight, Variable 3 could be a test for age, and so on. The original problem for this traditional form of factor analysis lies in the need to standardize each of the variables so that they can make sense when being correlated.⁴⁸ In the example given, height, weight, and age consist of

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Graham Upton & Ian Cook, eds. (2002). *A Dictionary of Statistics*. Oxford, OUP, p. 104.

⁴⁵ Watts & Stenner, *supra* note 33 at p. 10.

⁴⁶ Id.

⁴⁷ See *id.* at pp. 8-9.

⁴⁸ Id. at p. 9.

different units of measurement. Therefore, a question of whether person *a* is heavier than they are tall than they are old does not really make any sense.⁴⁹

In order to compare these variables, the units of measurement must be standardized.⁵⁰ This standardization process, called standard scores or Z scores, allows for a direct comparison of the differing units of measurement. The Z score is a mathematical expression of the distance between a particular absolute score and the mean average score of the measured population. Z scores allow for tests using different units of measurement to be compared relative to each other. By this example, it may turn out that person *a* is 75 percent heavier than all of the other samples, is 50 percent taller, and is 25 percent older.⁵¹ Once this information is obtained, the researcher can see that in this case, that person *a* is in fact heavier than she is tall and old (at least in relation to the population tested).⁵²

As stated in the preceding Section, Stephenson believed that the innovation of factor analysis just described could be inverted. While this form of factor analysis envisions a method for correlating different tests (variables), Stephenson inquired as to whether or not there was a means to correlate the persons being tested, and not the tests themselves. The variables are moved along the rows of the data matrix in Table 1, and the persons are moved into the columns. However, it is exactly this type of inversion that led to a number of theoretical debates about the appropriateness and usefulness of such an inversion of the technique of factor analysis.⁵³ This basic model of inversion, which is called the transposed matrix model, essentially turns the normal data matrix on its side.⁵⁴

From the very beginning, this idea about inverting the data matrix has caused widespread confusion about Q methodology and its practical import as compared to R methodology.⁵⁵ When Stephenson wrote his letter to *Nature* in 1935, his claim to an ‘inversion of the technique’⁵⁶ was a reference to an inversion of the by-variable factor analysis into a by-person factor analysis. He was interested in creating a method of psychological significance that could correlate people, not variables.⁵⁷ By the time that Stephenson penned this letter, the idea that traditional factor analysis could be inverted using the transposed matrix model was already being considered.⁵⁸ Ultimately, this was

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id. at pp. 12-13.

⁵⁴ Id. at p. 13.

⁵⁵ Id.

⁵⁶ Stephenson, *supra* note 2.

⁵⁷ See Cyril Burt & William Stephenson (1939). *Alternative Views of Correlations Between Persons*. Psychometrika. Vol. 4, p. 347.

⁵⁸ Brown, *supra* note 8 at p. 11.

not the creativity and novelty that Stephenson added to the method of factor analysis. Stephenson realized very early on that a mere inversion of the technique would result in largely unhelpful and statistically questionable results.⁵⁹

The basic claim of the transposed matrix model was that a researcher could use the same R methodology data to measure and correlate individuals instead of variables. However, when the data matrix is inverted, the need to standardize the data remains.⁶⁰ When using the same set of data as in an R methodology correlation of variables, a Q methodology correlation of persons needs the units of measurement for each person to be identical. Since this would almost never happen, and where this problem was solved through the standardization of variables through the process of determining Z scores in an R methodology analysis, the same process of standardization as applied to persons would only distort and confuse the correlations.⁶¹ When attempting to devise a means for standardizing by-person scores, Stephenson held that the factors it produced “can only be distorted, unreal or potential, with respect to any individual.”⁶²

However, it was this transposed or inverted matrix model version of Q methodology that was advanced by Cyril Burt, another prominent early factor analyst, and it is also the version of Q that has been produced in many textbooks in psychology.⁶³ There is a significant difference between the version of Q advanced by Burt (and others), and that advanced by Stephenson.⁶⁴ In Burt’s version, Q methodology uses the same set of data that has been gathered for R methodological purposes.⁶⁵ It merely attempts to change the focus from by-variable analysis to by-person analysis. Stephenson, on the other hand, believed that by-person factor analysis could only succeed if a wholly new type of data could be devised. It is this new type of data – called the Q sort – that would solve all of the design problems facing the transposed matrix model.⁶⁶

This new form of Q methodology and the data it demanded is characterized by the type of holistic analysis of subjectivity that Stephenson was attempting to achieve. According to Brown:

from this very first pronouncement, Stephenson made clear that R methodology referred to ‘a selected population of n individuals each of whom has been measured in m tests’

⁵⁹ Watts & Stenner, *supra* note 33 at p. 13.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² William Stephenson (1936). *The Foundations of Psychometry: Four Factor Systems*. Psychometrika. Vol. 1, pp. 195, 208.

⁶³ Brown, *supra* note 8 at p. 11.

⁶⁴ *Id.*

⁶⁵ *Id.* at p. 15.

⁶⁶ *Id.* at pp. 15-17.

(note the passive verb has been measured), and that Q methodology referred to a 'a population of n different tests (or essays, pictures, or other measurable material), each of which is measured or scaled by m individuals' (note the active verb is measured). In the former case, something is done to the person, as when we take blood pressure or measure height: [t]his is the objective mode and the person's stance relative to measurement is passive. In the latter case, the person actively does something, i.e., measures or scales a population of measurable material: [t]his is the subjective mode insofar as measurement is from the person's standpoint.⁶⁷

columns – for each individual Q sort – is amenable to the same kind of factor analysis used in R methodology. It allows for multiple Q sorts to be directly compared and correlated.

Q methodology of this type gives information about the similarity or difference in viewpoint, or segments of subjectivity, that exist among a population of individuals participating in a Q sort procedure. Each person is given the same set of heterogeneous statements and is asked to rank order them relative to each other.⁷² Each person's Q sort is a reflection of their viewpoint or perspective on a particular topic at that moment in time. It is able to take a subjective and ephemeral phenomenon such as one's viewpoint and hold it steady in time and space for reflection. While each Q sort reflects each individual's unique perspective, Q methodology and its factor analysis procedures is able to reduce the many individual viewpoints down to a number of themes, which represent a shared way of thinking about a certain topic.⁷³ Q methodology analyzes each individual's subjective perspective as a whole, and does not aim to generate correlations between objective attributes that are abstracted from the individual – such as nationality, age, or gender.⁷⁴ As such, a Q sort can be used with a small, selected sample of individuals and is not intended to generalize the results to a larger population.⁷⁵

2.2 Operant Subjectivity and Concourse Theory

While Q methodology has come to be a methodology rooted in the social sciences, it has its pedigree in psychology.⁷⁶ As such, Stephenson originally viewed Q methodology as a means of measuring single individuals.⁷⁷ In such a manifestation of Q methodology, a single person could conduct identical Q sorts according to different conditions of instructions.⁷⁸ The correlations of these different individual Q sorts could provide psychologically significant information about that individual.⁷⁹ Since Q methodology focuses on correlations about subjective aspects of the self, and not on objective attributes about people in general, the need for large sample sizes is reduced. However, Q methodology's relationship with the factor analytic tools of R methodology (which generally needs large sample sizes) and the prominent use of multiple participant Q method studies in the social sciences means that most of the self-focused psychological (single participant) orientation has been lost.

⁷² Id.

⁷³ Raadgever, *supra* note 25 at p. 439.

⁷⁴ Id.

⁷⁵ van Exel & de Graaf, *supra* note 15 at p. 2.

⁷⁶ Watts & Stenner, *supra* note 33 at pp. 27.

⁷⁷ Id. at pp. 50-51.

⁷⁸ Id.

⁷⁹ Id.

One of the main terms of art in Q methodology is that of operant subjectivity.⁸⁰ This term was coined by Stephenson to connote a challenge to the psychological behaviorists who used the term operant behavior (a term coined by BF Skinner) to describe the focus of psychological inquiry.⁸¹ John Watson, the founder of behaviorism, stated that “psychology as the behaviorist views it is a purely objective experimental branch of natural science.”⁸² The basic idea of the behaviorists was to reject psychological focus on the mind and ideas such as consciousness; and to instead focus purely on behaviors that could be observed and documented objectively.⁸³ Behaviors are operant, and therefore amenable to objective empirical observation because they are expressed spontaneously and made meaningful by their relationship with the immediate environment.⁸⁴ For example, a person can be observed to respond in a particular way to some external stimuli. The behavior that is emitted can be objectively observed without recourse to any knowledge about the internal workings of the subjective human mind.⁸⁵

Despite the complete rejection of inquiry into the subjective mind by the behaviorists, Stephenson believed that subjectivity could be observed empirically with the same scientific and objective rigor claimed by the behaviorists.⁸⁶ The idea of operant subjectivity is a claim about the possibility of reflecting on subjectivity – through the employ of Q technique – in the same manner as objectively observable behaviors.⁸⁷ As Watts and Stenner point out:

Stephenson’s *The Study of Behavior: Q-Technique and its Methodology* is sending a warning to the behaviorists that their rejection of mentalist terminology should not presage the abandonment of subjectivity or studies conducted from the first-person perspective. Q methodology allowed the latter to be studied reliably and ‘with full scientific sanction, satisfying every rule and procedure of scientific method.’ It offered the potential to deliver a first-person or subjective science of exactly the same standing and quality as third-person, objective science that the behaviorists were continuing to develop. To abandon subjectivity, Stephenson argued, was like throwing the baby out with the bathwater. This turned out to be very prescient warning, for the loss of this baby proved subsequently to be a key factor in the demise of behaviorism.⁸⁸

In deriving a technique for the measurement of operant subjectivity using the factor analytic tools developed in other branches of psychology in the early twentieth century, Stephenson held that there was no reason to foreclose on

⁸⁰ Brown, *supra* note 3 at pp. 12-13.

⁸¹ *Id.* at p. 3.

⁸² John Watson (1913). *Psychology as the Behaviorist Views It*. Psychological Review. Vol. 20, p. 158.

⁸³ Watts & Stenner, *supra* note 33 at pp. 25-26.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at p. 26.

⁸⁷ *Id.* at pp. 26-27.

⁸⁸ Watts & Stenner, *supra* note 33 at p. 27.

the study of first-person perspectives as the behaviorists advocated.⁸⁹ In a similar vein, Noam Chomsky's critique of another prominent behaviorist, BF Skinner, is said to have been the beginning of the late twentieth century turn to the cognitive sciences and a return to the study of the mind as the object of psychological inquiry.⁹⁰ Coming at the problem from varying angles, it appears that Stephenson and Chomsky both understood that a purely objective, or third-person, understanding of psychological events would only be able to identify a limited amount of cognitive or mental phenomena.

To make subjectivity operant and empirically observable, Stephenson had to develop a means for identifying such operantcy. He does this through the innovation of the Q sort.⁹¹ However, in devising the Q sort, he needed a data set that could deliver on his promise of operant subjectivity. He does this through another of his innovations: the concourse theory of subjective communicability.⁹² In a similar vein to the behaviorists, Stephenson wanted to solve the problem of mentalist concepts (such as mind and consciousness) by abandoning them.⁹³ Unlike the behaviorists, however, Stephenson held that subjective aspects of the mind could be observed through the process of conspiring, or the 'sharing of knowledge.'⁹⁴ The possibility of observing such shared knowledge is reinforced by the interbehavioral psychology of JR Kantor,⁹⁵ who Stephenson held in high esteem throughout his career.⁹⁶ A Q method study, according to Stephenson, requires:

preparing phenomena of mind, so-called, so that it can display its structure. The preparation involves two steps. One is to dispense with mind as 'non-essential' and [the other is] to replace it with what is observable, namely, communicability.⁹⁷

Communicability is the:

observable domain of self-referent statements and opinion. It is an overall field of shared knowledge and meaning from which it is possible to extract an identifiable 'universe of statements for [and about] any situation or context.' Each identifiable universe is called a concourse.⁹⁸

⁸⁹ Id. at pp. 25-26.

⁹⁰ Noam Chomsky (1959). *Review of Verbal Behavior by BF Skinner*. *Language*. Vol. 35, p. 26.

⁹¹ Watts & Stenner, *supra* note 33 at p. 16.

⁹² Id. at pp. 25-27.

⁹³ Id. at p. 27.

⁹⁴ Id. at p. 33.

⁹⁵ JR Kantor (1959). *Interbehavioral Psychology: A Sample of Scientific System Construction, Second Edition*. Chicago, Principia Press.

⁹⁶ Id. at p. 27.

⁹⁷ William Stephenson (1982). *Q Methodology, Interbehavioral Psychology, and Quantum Theory*. *Psychological Record*. Vol. 32, pp. 235, 237.

⁹⁸ Watts & Stenner, *supra* note 33 at p. 33.

In practical terms, the concourse – or population of statements on any particular topic – is the subject-matter of the Q sort in a Q method study.⁹⁹ Participants in a Q method study take each of these statements and operate with them through the activity of rank-ordering, or sorting them, according to a matrix similar to the one drawn in Figure 1 above. According to Stephenson, the concourse itself is meaningless, but that it gains meaning through the activity of Q sorting.¹⁰⁰ This Q sorting procedure is subjective in that it is me (and not another person) doing the sorting, and that the final positioning of the statements reflects my point of view or perspective at that moment in time.¹⁰¹ It is this process of Q sorting that is amenable to factor analysis and will be able to scientifically articulate shared ways of thinking on a particular topic. It is a means of converting subjective phenomena into objective phenomena.

2.3 The Science of Subjectivity

Using the concepts of operantcy and concourse theory, Q methodology is capable of delivering a method for empirically measuring human subjectivity. The subjectivity to which Q methodology refers is that which emanates from the first-person perspective. It focuses on the subjective self as opposed to the objective world; and while concepts of the subjective and the objective have multiple meanings, it is this primary distinction that is central. In terms of scientific knowledge (and legal knowledge for that matter), a strong dualism is created between knowledge that is subjective and knowledge that is objective. In most circles of scientific inquiry, that which is empirically observable is often given the label of objectivity, and that which is empirically unobservable is said to be subjective. However, this dualism breaks down if the kind of subjectivity of Q methodology is in fact amenable to empirical observation of the type that is normally reserved for observations considered to be objective.

As has been noted in previous Chapters, the advantage of rejecting dualistic concepts such as mind-matter, value-fact, and subject-object is that one can begin to focus on the ways that these supposed dichotomies rely on one another for gaining knowledge. As the neopragmatist philosopher Hilary Putnam has argued, they are entangled.¹⁰² The identification of the collapse of the subject-object dualism is attributable to the pragmatists of the early

⁹⁹ Id. at p. 34.

¹⁰⁰ William Stephenson (1988). *The Quantumization of Psychological Events*. Operant Subjectivity. Vol. 12, pp. 1, 9.

¹⁰¹ Watts & Stenner, *supra* note 33 at p. 26.

¹⁰² See Hilary Putnam (2004). *The Collapse of the Fact-Value Dichotomy and Other Essays*. Cambridge, Harvard University Press.

twentieth century; preeminently, John Dewey, Charles Pierce, George Mead, and William James.¹⁰³

In psychological circles, James has had the most lasting philosophic influence on the scientific study of psychology; and it is James that is mostly closely tied to the development of Q methodology.¹⁰⁴ However, it appears that Stephenson's attribution of James's theoretical influence was noticed only in retrospect.¹⁰⁵ Stephenson's work developed early on as a reaction to the constraints of traditional factor analysis as Spearman and Burt had envisioned it. It was only in his later writings that he was able to appreciate that "the achievement of Q was largely due to two chapters in William James (1890) *The Principles of Psychology*."¹⁰⁶

This understanding of the foundations of Q methodology provides an interesting corollary with the development of logical positivism in the natural sciences. Like the development of behaviorism in psychology, the logical positivists sought to deliver a purely objective method for the sciences more broadly.¹⁰⁷ And where the behaviorists were defeated through the rise of the cognitive sciences in the latter part of the twentieth century, the demise of the logical positivists came with attacks from neopragmatist figures, such as WVO Quine, writing on the philosophy of science.¹⁰⁸ It has been realized that the achievement of a purely objective science or psychology, as the positivists and behaviorists envisioned it, could not be sustained.¹⁰⁹ The idea that all subjective modes of thought could be purged from scientific inquiry was a noble endeavor, but ultimately doomed due to the fact that all methods of inquiry require the observations and activities of a human subject. However, this insight was not a phenomenon that had its philosophic pedigree in late twentieth century thought; rather, it shares ideas that were central to the original pragmatists of the late nineteenth and early twentieth century.

The main problem presented to the logical positivists and the behaviorists was how to deal with mental knowledge that was not amenable to empirical discovery. In short, their answer was to reject it as completely outside the scope of inquiry. The pragmatists had already preempted this problem by claiming that there was no reason to exclude mental entities from the scope of inquiry.¹¹⁰ However, they did not claim that the subjective mind was not amenable to objective verification.¹¹¹ Rather, pragmatists such as James held

¹⁰³ See Chapter 2, Section 3.5.

¹⁰⁴ Watts & Stenner, *supra* note 33 at pp. 28-31.

¹⁰⁵ *Id.* at p. 28.

¹⁰⁶ William Stephenson (1988). *Quantum Theory of Subjectivity*. Integrative Psychiatry. Vol. 6, pp. 180, 180.

¹⁰⁷ See Chapter 2, Section 3.4.

¹⁰⁸ See WVO Quine (1951). *Two Dogmas of Empiricism*. Philosophical Review. Vol. 60, p. 20.

¹⁰⁹ See Chapter 2, Section 3.4.

¹¹⁰ Watts & Stenner, *supra* note 33 at p. 28.

¹¹¹ *Id.* at pp. 28-29.

that ideas of consciousness and mind ought to be looked at, not as ontologically existent entities, but as a function or activity.¹¹² If viewed in this manner, then neither subjectivity nor objectivity needed to be taken as primary.¹¹³ Instead, the focus turns on the empirical verification of both subjective and objective phenomena. James called this focus pure experience, and it was this pure experience that should be central to any type of inquiry.¹¹⁴

In many ways, this is exactly the same project that Stephenson sought to achieve with Q methodology. He sought a method for making the subjective observable and amenable to scientific inquiry.¹¹⁵ He did not aim to do this by advancing a means for deriving objective answers to subjective entities such as mind, value, consciousness, or morality; rather, he sought to maintain the subjective as non-entities, but by making the subjective operant, he believed that these subjective non-entities could be held still long enough to make them amenable to objective analysis through the innovation of Q methodology.¹¹⁶

2.4 Q Methodology and Quantum Theory

In the history of philosophic thought, the pragmatists fell out of favor with the rise of the objectivist sciences and the behaviorist psychology of the early twentieth century.¹¹⁷ It is only in the late twentieth and early twenty-first century that the flaws in a purely objective and value-free focus in philosophic thought has once again become apparent. This shift coincides in large ways with the quantum theoretical revolution in the physical sciences, where it has been described as the “most generally applicable of all theories.”¹¹⁸ According to Brown:

[o]nce Einstein’s theories began penetrating the public’s thought, they were extended by analogy to human activity – as in cultural relativity, value relativity, and so forth – so that in virtually all matters nowadays anyone’s point of view is considered just as valid as anyone else’s, and this implicates even scientific theories (with obligatory bows to Thomas Kuhn). Now that quantum theory has reached popular levels, however, terms such as paradoxical, indeterminate, chaotic, and complementary are appearing with greater frequency and are increasingly nominated as descriptors of choice. Consequently, the

¹¹² Id. at p. 29.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id. at pp. 29-30.

¹¹⁶ Id.

¹¹⁷ See Chapter 2, Section 3.4.

¹¹⁸ Ian Stewart (1989). *Does God Play Dice? The New Mathematics of Chaos*. Boston, Wiley-Blackwell, p. 331.

race is now on to determine how far this quantum principle can be taken into human reality.¹¹⁹

The answer, in most cases, is not very far. However, interestingly, the mechanics of factor analysis are virtually identical mathematically to the matrix model of quantum mechanics devised by Werner Heisenberg, Max Born, and Pascual Jordan.¹²⁰ And while factor analysis in psychology and quantum mechanics in physics apparently developed without any cross-fertilization, it is remarkable that equivalent mathematical models were created for distinct purposes at just about the same time in human history.¹²¹ Nonetheless, the difference between Newtonian or classic mechanics and quantum mechanics has been profound. In relation to general philosophic thought, the analogy between the two theoretical models has also been widespread.¹²² Where the Newtonian model correlates with the modernist view of world where objective truths – in all realms of the natural and human world – are possible, the quantum model shifts that reality to a postmodern view whereby the natural and human world are only knowable relatively and contextual – never absolutely.

In quantum mechanics, “physicists realized that specific outcomes were the function of the method employed.”¹²³ A prime example of this is the extraordinary discover that, depending on method, light is either a wave or particle phenomena. This counter-intuitive phenomenon is summarized by Heisenberg’s uncertainty principle.¹²⁴ The uncertainty principle holds that one cannot know the present state of the world in full detail; and as such, marks a distinct break with the determinism associated with the classical view of the universe. This indeterminacy is especially relevant to subjective states of the mind. Subjective knowledge of the type that Q methodology attempts to measure is similar in structure to the problems of observational perspective in quantum age physics.¹²⁵ Heisenberg states that science is a human enterprise, and that it is an interplay of the object and the subject; what science

¹¹⁹ Steven Brown (1993). *Q Methodology and Quantum Theory: Analogies and Realities*. Meeting of the International Society for the Scientific Study of Subjectivity (ISSSS). 22-24 October 1992. Columbia, University of Missouri-Colombia.

¹²⁰ Watts & Stenner, supra note 33 at p. 36; “One of the most striking features of factor analysis is this: not only in its general nature, but also in many minor details the peculiar type of mathematical argument which the psychological factorist has develop is almost exactly the same as that which is employed by the quantum physicist in analyzing the fundamental constitution of the material world.” Cyril Burt (1940). *The Factors of the Mind*. London, University of London Press, p. 92.

¹²¹ Watts & Stenner, supra note 33 at p. 36.

¹²² Brown, supra note 119.

¹²³ Bruce McKeown (1990). *Q Methodology, Communication, and the Behavioral Text*. Electronic Journal of Communication. Vol. 1, p. 1.

¹²⁴ Id.; see also Werner Heisenberg (1958). *Physics and Philosophy*. New York, Harper & Row.

¹²⁵ McKeown, supra note 123.

“describes is not nature as such, but nature as exposed to man’s method of questioning.”¹²⁶

In this way, and as opposed to classical mechanics:

quantum theory proper allows that physicist to ascertain the basic physical states or positions that are taken up by an ensemble of atoms in relation to a particular experimental setting and a particular act of measurement. Q methodology, on the other hand, understood in quantum fashion, might allow interested researchers to ascertain the basic psychological states or positions taken up by an ensemble of persons in relation to a particular object of enquiry under a particular condition or instruction. In short, physicists use quantum theory to study and understand a related series of observables (or objects), while Q methodology can be used to study and understand a related series of observers (or subjects).¹²⁷

3. THE TECHNIQUE OF Q METHODOLOGY

Performing an actual Q method study requires an understanding of the technique and practices need to conduct such a study. A Q method study consists of five steps, each of which are described below: 1) a collection of all possible statements concerning a particular issue or topic (called the concourse), 2) a selection of the most relevant statements (called the Q set), 3) a selection of the respondents (called the P set), 4) the process of ranking of statements by respondents according to how much they agree or disagree with each statement according to a specific condition of instruction (called the Q sort), and 5) an analysis and interpretation of the results. Before turning to the description of each step in a Q study, it may prove useful to provide a summary of the methodology from the leading authority on the use of Q methodology:

[m]ost typically, a person is presented with a set of statements about some topic, and is asked to rank-order them (usually from ‘agree’ to ‘disagree’), an operation referred to as ‘Q sorting.’ The statements are matters of opinion only (not fact), and the fact that the Q sorter is ranking the statements from his or her own point of view is what brings subjectivity into the picture. There is obviously no right or wrong way to provide ‘my point of view’ about anything – health care, the Clarence Thomas nomination, the reasons people commit suicide, why Cleveland can’t field a decent baseball team, or anything else. Yet the rankings are subject to factor analysis, and the resulting factors, inasmuch as they have arisen from individual subjectivities, indicate segments of subjectivity which exist. And since the interest of Q methodology is in the nature of the segments and the

¹²⁶ Id.

¹²⁷ Watts & Stenner, *supra* note 33 at p. 36.

extent to which they are similar or dissimilar, the issue of large numbers, so fundamental to most social research, is rendered relatively unimportant.¹²⁸

3.1 The Concourse

Central to Q methodology is the concept of the concourse. The concourse is “the flow of communicability surrounding any topic”¹²⁹ in the “ordinary conversation, commentary, and discourse of everyday life.”¹³⁰ It is the starting point for any Q study, and requires that the researcher gather a representative sample of the concourse being evaluated. This could potentially include thousands and thousands of statements depending on the breadth of the subject-matter. It is therefore important to carefully design the specificity of the research question from which the concourse will be drawn. The concourse is a technical concept used in Q methodology to refer to all the possible statements that can be made about a particular topic.¹³¹ It is from this broad concourse that a representative sample will be drawn from to use in the actual Q method study.¹³² The concourse can be collected in a number of ways: interviewing people, participant observations, workshops, roundtable discussions, lectures, newspapers, academic papers, journal articles, books, magazines, and speeches.¹³³ The gathered material represents all of the (as comprehensive a collection as possible) arguments, opinions, debates, conference proceedings, discussions, and spoken and written word, that individuals have to say about a particular topic.¹³⁴ The concourse should be broad and contain elements from all persons discussing a particular topic. The statements in the concourse should also stay as close to their original wording as possible.

3.2 The Q Set

In order to conduct a Q methodology study, the concourse must be reduced to a manageable number of participant statements.¹³⁵ This reduced number of statements is called the Q set and usually consists of 40 to 50 statements; but it can be more or less depending on the objectives of a particular Q method study.¹³⁶ The selection of the most relevant statement from the concourse is a

¹²⁸ Brown, *supra* note 8 at pp. 93-94.

¹²⁹ *Id.*

¹³⁰ van Exel & de Graaf, *supra* note 15 at p. 4.

¹³¹ This is not to be confused with concept of discourse.

¹³² This is called the Q set or Q sample and will be discussed in detail below.

¹³³ Brown, *supra* note 8 at p. 95.

¹³⁴ van Exel & de Graaf, *supra* note 15 at p. 4.

¹³⁵ The aim is to produce a “reasonably accurate survey of positions likely to be taken on an issue.” Steelman & Maguire, *supra* note 27 at p. 364.

¹³⁶ van Exel & de Graaf, *supra* note 15 at p. 4.

crucial activity in Q methodology.¹³⁷ According to Brown, the selection of statements from the concourse remains “more of an art than a science.”¹³⁸ However, this is not to say that a well-balanced Q set cannot be derived without injecting the researcher’s bias into the process.¹³⁹

The researcher can use a number of procedural structures for selecting a representative miniature of the concourse, and to hedge against any bias in the selection of statements. Such a structure may emerge from further examination of the statements in the concourse or the structure may be imposed on the concourse based on a specific method. One specific method is to filter the concourse through a matrix that assigns statements to a set of categories that represents the entire ‘opinion domain.’¹⁴⁰ Under such a technique, “Q methodology models a universe, using the experimental design principles advanced by Ronald Fisher.”¹⁴¹ These experimental design principles are articulated through what Fisher calls the balanced-block approach.¹⁴² It is a procedure for creating a balanced and representative Q set from the concourse. Extensive examples of this process of experimental design are detailed in both the seminal works of Brown¹⁴³ and Stephenson.¹⁴⁴

By providing a systematic design approach for establishing the Q set, the researcher is forced to select statements widely different from one another in order to make the Q set broadly representative. The aim is to arrive at a Q set that is representative of the wide range of existing opinions on a topic. However, according to experts on Q methodology, the exact constitution of the Q set can vary widely and still produce similar results.¹⁴⁵ Different selection criteria may lead to differing Q sets from the same concourse. There have been a number of comparative studies that indicate that different sets of statements structured in different ways can nevertheless be expected to converge on the same conclusions.¹⁴⁶ This is likely because it is the subject (participant) that gives meaning to the statements during the Q sort procedure, and therefore, the exact structure of the Q set is not critical so long as there are a wide array

¹³⁷ Id.

¹³⁸ Brown, *supra* note 30 at p. 53.

¹³⁹ Steelman & Maguire, *supra* note 27 at p. 365.

¹⁴⁰ See Steven Brown (1986). ‘Q Technique and Method: Principles and Procedures,’ in William Berry & Michael Lewis-Black, eds. *New Tools for Social Scientists: Advances and Applications in Research Methods*. London, Sage.

¹⁴¹ Dan Durning & Steven Brown (2007). ‘Q Methodology and Decision Making,’ in Göktuğ Morçöl, ed. *Handbook of Decision Making*. Boca Raton, CRC Press, p. 540.

¹⁴² The principles of experimental design as developed by the eminent evolutionary biologist, Ronald Fisher, provides the basis for selecting a Q set from the concourse in an principled manner. See Ronald Fisher (1935). *The Design of Experiments*. London, Oliver & Boyd.

¹⁴³ Brown, *supra* note 30 at pp. 186-91.

¹⁴⁴ Stephenson, *supra* note 4.

¹⁴⁵ Watts & Stenner, *supra* note 33 at pp. 64-66.

¹⁴⁶ Dan Thomas & L Baas (1992). *The Issue of Generalization in Q Methodology: ‘Reliable Schematics’ Revisited*. *Operant Subjectivity*. Vol. 16, p. 18.

of viewpoints present in the resulting Q set.¹⁴⁷ Once a representative sample has been selected, each statement is edited, randomly numbered, and then placed on a card – for face-to-face Q sorting interviews – or included in an online Q sorting tool.¹⁴⁸

3.3 The P Set

The P set is the number of individuals that are participating in the Q method study. One of the advantages of Q methodology is that only a limited number of respondents is needed in order to produce statistically relevant results.¹⁴⁹ Since Q methodology correlates persons instead of tests, a small number of participants are given a large number of test items instead of conventional factor analysis (R methodology), which requires a large number of participants being given a small number of tests.¹⁵⁰ The results of a Q method study are used to describe a population of individual viewpoints, and not a population of traits (as in R methodology).¹⁵¹ This means that:

Q [methodology] does not need a large number of subjects as does R [methodology], for it can reveal a characteristic independently of the distribution of that characteristic relative to other characteristics.¹⁵²

This means that so-called opportunity sampling is rarely a good strategy in selecting a P set for a Q method study.¹⁵³ The reason for this is that since a Q method study is an inversion of an R method study, the Q set actually becomes the sample (as opposed to the sample being the population of participants in an R method study), and the P set actually becomes the variable. This observation:

suggests the pressing need to select a participant group, or P set, with relative care and consideration. Studies that feature ill-considered or apparently random set of variables are obviously to be avoided. We want to discover relevant viewpoints using Q methodology

¹⁴⁷ Jonathan Donner (2000). 'Using Q-Sorts in Participatory Processes: An Introduction to the Methodology,' in Richard Krueger, et al. *Social Analysis: Selected Tools and Techniques*. World Bank Social Development Papers No. 36. Washington, World Bank, p. 27.

¹⁴⁸ See e.g. the study conducted in the context of this work, available at: www.fairnessdiscourse.org (last accessed 1 September 2013).

¹⁴⁹ Durning & Brown, *supra* note 141 at p. 542.

¹⁵⁰ Danielson, *supra* note 1 at pp. 9-10.

¹⁵¹ "Researchers use R methodology, the statistical methods that dominate social science research, to identify the characteristics associated with such things as attitudes, opinions, or decisions of populations or samples. With these methods, they can find evidence that variables such as age, race, sex, and income do or do not have a statistically significant influence on a sample of . . . decisions concerning [some subject]. However, researchers cannot use these methods to enable a set of [participants] to reveal, in their full complexity, the preferences, values, and interests underlying their choices." Durning & Brown, *supra* note 141 at p. 542.

¹⁵² van Exel & de Graaf, *supra* note 15 at p. 2.

¹⁵³ Watts & Stenner, *supra* note 33 at p. 70.

and that means finding participants who have a defined viewpoint to express, and even more importantly, participants whose viewpoints matters in relation to the subject at hand.¹⁵⁴

According to Brown, this means that the P set must always be more “theoretical . . . or dimensional . . . than random or accidental.”¹⁵⁵ The P set is usually smaller than the Q set, and should be selected based on the subject-matter being considered.¹⁵⁶ Where the Q set typically comprises 40 to 50 statements, the P set does not need to exceed 40.¹⁵⁷ The aim is to have three or four participants defining each anticipated viewpoint. The P set is not a random sample. It is a structured sample of respondents who are theoretically relevant to the problem under consideration; for instance, persons who are expected to have a clear and distinct viewpoint regarding the particular problem under investigation.¹⁵⁸

3.4 The Q Sort

Once the concourse has been reduced down to a manageable Q set, the P set will be asked to sort the statements from the Q set. This is called the Q sort, and it is this procedure that will reveal the common perspectives or viewpoints among the individuals participating in the study. The general procedure is as follows. The Q set is given to the participant in the form of a pack of randomly numbered cards, each card containing one of the statements from the Q set.¹⁵⁹ The participant is instructed to rank the statements according to some rule or question, called the condition of instruction.¹⁶⁰ Typically, the rule of instruction is: please sort these statements according to your point of view or perspective on the topic or issue being discussed. The statements have to be ranked into score categories representing a sliding scale, usually from strong agreement to strong disagreement.

¹⁵⁴ Id. at pp. 70-71.

¹⁵⁵ Brown, *supra* note 30 at p. 192. For Brown, Q methodology only requires “enough subjects to establish the existence of a factor for purposes of comparing one factor with another. What proportion of the population belongs in one factor rather than another is a wholly different matter and one about which Q technique . . . is not concerned.” Id.

¹⁵⁶ van Exel & de Graaf, *supra* note 15 at pp. 5-6.

¹⁵⁷ Id. at p. 6.

¹⁵⁸ “The level of discourse dictates the sophistication of the concourse: hence, factors which should be taken into account in decisions about who should receive a liver transplant at a particular hospital would likely involve the medical personnel, the potential recipients (and perhaps the donor), and possibly even a philosopher specializing in medical ethics (or sociologist with expertise in medical sociology) who might be called in as a consultant. A study of public opinion, on the other hand, would necessitate interviewing representatives of those segments of the society apt to have something to say about the issue in question.” Brown, *supra* note 8 at pp. 95-96.

¹⁵⁹ If the participants are not available to conduct the Q sort in the presence of the researcher, there are online tools that can replicate the process and provide the same results. See www.fairnessdiscourse.org (last accessed 1 September 2013).

¹⁶⁰ Durning & Brown, *supra* note 141 at p. 542.

For most Q sorting data matrices, it is sufficient to use a distribution with a continuum ranging from -4 being strong disagreement with the statement to +4 being strong agreement with the statement (see Figure 1 above). However, the kurtosis¹⁶¹ of this distribution depends on the controversiality of the topic.¹⁶² For example, in cases where:

the involvement, interest, or knowledge of the respondents is expected to be low, or a relatively small part of the statements is expected to be salient, the distribution should be steeper in order to leave room for ambiguity, indecisiveness or error in the middle of the distribution.¹⁶³

This would be an example of a deep distribution (see Figure 2 below). On the other hand, if the participants:

are expected to have strong, or well-articulated opinions on the topic at issue, the distribution should be flatter in order to provide more room for strong (dis)agreement with the statements.¹⁶⁴

This would be an example of a shallow distribution (see Figure 3 below).

The participant is asked to read through all of the statements carefully in order to get an impression of the type and range of viewpoints and opinions at issue.¹⁶⁵ The participant is then instructed to begin with a rough sorting of the statements, by dividing the statements into three piles: 1) statements that the participant generally agrees with, 2) statements the participant disagrees with, and 3) statements with which the participant is neutral, uncertain, ambiguous, or undecided. This is called the pre-sort.¹⁶⁶ Next, the participant refines the sort by placing the statements in the Q sort matrix in order from most disagree to most agree. This requires the participant to carefully compare the statements relative to each other. The results of the sort are then placed on a score card.¹⁶⁷ Whether conducting the Q sort online or face-to-face, it is important to follow up the Q sorting procedure with a few questions about why the participant assigned certain statements to the most extreme categories.¹⁶⁸ This supports a valid and fast interpretation of factors in the last step of a Q method study.¹⁶⁹ This process can range in time from fifteen minutes to one

¹⁶¹ Kurtosis is a term referring to the slope of the distribution in probability statistics.

¹⁶² van Exel & de Graaf, *supra* note 15 at pp. 5-6.

¹⁶³ *Id.* at p. 6.

¹⁶⁴ *Id.* at p. 7.

¹⁶⁵ *Id.*

¹⁶⁶ Watts & Stenner, *supra* note 33 at pp. 74-76.

¹⁶⁷ Or in the case of an online Q sorting process, the data can be automatically recorded onto a Microsoft Excel spreadsheet.

¹⁶⁸ Brown, *supra* note 8 at pp. 102-03.

¹⁶⁹ *Id.*

statements without prescribing the shape of the distribution.¹⁷¹ For the first issue, by using an online tool for the Q sorting procedure, participants are able to perform the sort at any convenient time, and it significantly reduces the time required to perform the procedure.¹⁷² A disadvantage of the online approach is that there is the potential for a lower response rate and there are limited possibilities for the researcher to explain to the participant how to perform the task. However, there is no apparent difference in the reliability and validity of the results, whether conducted online or face-to-face.¹⁷³

The final issue that must be addressed in the design of the Q sort is whether or not a forced distribution of the statements is used. A fixed distribution¹⁷⁴ forces the participants to spend more time reflecting on how each statement relates to one another.¹⁷⁵ A so-called forced, or quasi-normal, distribution Q sort is given in Figures 1, 2, and 3 above. By limiting the number of statements that can be placed in each category, the respondent has to make judgments about where to place a particular statement in relation to the others.¹⁷⁶ This process has been shown to decrease the risk of arbitrary or biased sorting.¹⁷⁷ However, some Q study participants have complained that such a fixed distribution involves excessive time and effort, and that their perspective could not be expressed well given the static distribution.¹⁷⁸ This problem can be solved by allowing participants to distribute statements freely without prescribing the shape of the distribution or by giving a distribution that is set more loosely than the typical quasi-normal (v-shaped) distribution. An example of a free distribution is given in Figure 4 above. While there is no consequence for the factor analysis, Q method experts warn:

that when respondents are not at all stimulated to evaluate their agreement with one statement relatively to their agreement with another . . . [the] accuracy of the elicited perspectives will be less.¹⁷⁹

3.5 The Analysis

Once all of the Q sorts have been completed, they must be subjected to factor analysis.¹⁸⁰ The analysis of the Q sorts is a purely technical, objective

¹⁷¹ Watts & Stenner, *supra* note 33 at pp. 77-78; see also Steven Brown (1971). *The Forced-Free Distinction in Q Technique*. Journal of Educational Measurement. Vol. 8, p. 283.

¹⁷² Raadgever, *supra* note 25 at p. 454.

¹⁷³ Watts & Stenner, *supra* note 33 at pp. 87-88; van Exel & de Graaf, *supra* note 15 at pp. 7-8.

¹⁷⁴ E.g. a Q sort that requires the respondent to place a specific number of statements in each of the -4 to +4 slots.

¹⁷⁵ Danielson, *supra* note 1 at p. 19.

¹⁷⁶ *Id.*

¹⁷⁷ Raadgever, *supra* note 25 at p. 443.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ van Exel & de Graaf, *supra* note 15 at p. 8.

procedure – and is therefore sometimes referred to as the scientific basis of Q methodology.¹⁸¹ As has been described in early sections of this Chapter, factor analysis is a statistical data reduction technique used to explain as much of the variability among the observed Q sorts as possible in terms of a few unobserved scoring patterns, called factors.¹⁸² The purpose of a factor analysis:

is to account for as much of th[e] study variance as is possible – i.e. to explain as much as we can about the relationships that hold between the many Q sorts in the group – through the identification of, and by reference to, and sizable portions of common or shared meaning that are present in the data. These portions or dimensions of shared meaning are our factors.¹⁸³

While this analysis is capable of being done by hand¹⁸⁴ or with other statistical software such as SPSS,¹⁸⁵ there is also a software tool called PQMethod that is specifically designed for analyzing and correlating Q sorts.¹⁸⁶ PQMethod is freely available online and can support the analysis of the Q sorts using factor analysis.¹⁸⁷

First, PQMethod calculates the correlation matrix of all the Q sorts.¹⁸⁸ This resulting correlation matrix represents the level of (dis)agreement between the individual Q sorts. Next, this correlation matrix is subjected to factor analysis. The program produces the seven factors with the highest explanatory value, and presents the ratio of the total variance between the Q sorts that each factor explains.¹⁸⁹ These are called the unrotated factor loadings. Participants with similar views on the topic under investigation will share the same factor.¹⁹⁰ A factor loading is determined for each Q sort, expressing the extent to which each Q sort is associated with each factor. The next step is for the analyst is to choose the number of factors to be included in the analysis. Often the number of factors to be selected must meet two criteria: 1) the factors should at least explain more of the total variance than a single Q sort,¹⁹¹ and 2) a minimum of two Q sorts must load significantly on that factor.¹⁹²

Once the analyst has chosen the appropriate number of factors for further analysis, the next step in the analysis is to clarify and enhance the structure

¹⁸¹ Id.

¹⁸² Raadgever, *supra* note 25 at p. 443.

¹⁸³ Watts & Stenner, *supra* note 33 at p. 98.

¹⁸⁴ See Brown, *supra* note 30 at pp. 201-47.

¹⁸⁵ Watts & Stenner, *supra* note 33 at p. 94.

¹⁸⁶ Id.

¹⁸⁷ *PQMethod*, available at: <http://schmolck.userweb.mwn.de/qmethod> (last accessed 1 September 2013).

¹⁸⁸ Watts & Stenner, *supra* note 33 at pp. 197-98.

¹⁸⁹ Id. at pp. 98-99.

¹⁹⁰ Id.

¹⁹¹ In psychometric terms, this means that the eigenvalue should be a value more than one.

¹⁹² Watts & Stenner, *supra* note 33 at pp. 105-08.

of the unrotated factors by objectively maximizing variance between each of them through the process of factor rotation.¹⁹³ There are a number of ways to conduct the factor rotation. Principally, the factor rotation can be done using a by-hand method or a varimax method.¹⁹⁴ As the name suggests, varimax rotates the factors so that they explain the maximum variance that exists for each factor.¹⁹⁵ The downside of this approach is that it is completely automated and operates statistically using Thurstone's principle of simple structure.¹⁹⁶ This means that in some cases a varimax rotation could skew the results or fail to provide certain nuances associated with the individual factors.

An alternative method of factor rotation is the by-hand method, which allows the researcher to rotate the factors according to observations about the data as they exist in substantive reality.¹⁹⁷ There may be circumstances, for example, "in which we want to focus attention on a specific Q sort or Q sorts during the analysis and interpretation."¹⁹⁸ This is not going to be possible under varimax rotation, but is certainly possible using the by-hand method. It is for this reason that both Brown and Stephenson advocate the use of the by-hand method over the varimax method for factor rotation.¹⁹⁹ Regardless of what method is employed, the factor rotation process is an essential component of the factor analytic process because without it, the unrotated factor loadings will not be able to clearly or best explain the distinctions between the various factors.²⁰⁰

The final calculation for PQMethod is to produce the final factor estimate: the final factor estimate is an average of the defining Q sorts as weighted by their factor loadings.²⁰¹ The factors that have been chosen and rotated must be further refined through a process of determining which individual Q sorts will define each factor.²⁰² These are the factor-exemplifying or defining Q sorts, and are usually selected on the basis that they have a statistically significant and clean loadings on that factor.²⁰³ From this point, PQMethod will be able to produce the ultimate factor scores: the ultimate factor scores are an average of the Q sorts as weighted by their factor loadings.²⁰⁴ Each resulting final factor

¹⁹³ Id. at pp. 114-22.

¹⁹⁴ Id. at p. 122.

¹⁹⁵ Id. at p. 125.

¹⁹⁶ LL Thurstone (1947). *Multiple-Factor Analysis*. Chicago, University of Chicago Press; see also Id. at pp. 125-26.

¹⁹⁷ Id. at p. 123.

¹⁹⁸ Id.

¹⁹⁹ However, Brown has noted that the choice of method should depend "on the nature of the data and upon the aims of the investigator." See Brown, *supra* note 30 at p. 238. In other words, there may be cases where the use of varimax rotation is appropriate.

²⁰⁰ Watts & Stenner, *supra* note 33 at pp. 114-22.

²⁰¹ Id. at p. 129.

²⁰² Id. at pp. 129-33.

²⁰³ Id.

²⁰⁴ Raadgever, *supra* note 25 at p. 444.

represents a group of individual points of view that are highly correlated with each other and uncorrelated with others.²⁰⁵

This process also produces a weighted score for each item (statement) in the factor estimate and is then converted into a Z (standard) score.²⁰⁶ Each resulting final factor score represents a group of individual points of view that are highly correlated with each other and uncorrelated with others.²⁰⁷ This enables cross-factor comparisons to be made, which is especially important in the context of Q methodology's use in this work because it allows the researcher to identify areas of overlapping consensus and dissent across factors.²⁰⁸ The Z scores also allow the researcher to produce a factor array for each factor.²⁰⁹ The factor array is "no more or less than a *single Q sort configured to represent the viewpoint of a particular factor* [emphasis in original]".²¹⁰ Establishing a factor array for each factor provides the analyst with a Q sort configuration that best exemplifies a factor.²¹¹ The factor array for each factor is useful at the interpretation stage of a Q method study by providing a clear rank ordering of the statements that best explain a particular factor.²¹²

3.6 The Interpretation

By translating the analysis of the Q sorts into factors, the researcher must still find a way to interpret what the factors mean. The final stage of any Q method study is to interpret the results of the quantitatively-derived factor analysis. It is at this stage that meaningful information can be understood. Once the Q sorts have been analyzed and the resulting factors have been delineated, the researcher must construct the narratives that each factor has come to represent. This can be difficult to do because:

generating descriptions of social perspectives is something of an art. Experience helps immensely, as does familiarity with the topic. However, too much familiarity can also be dangerous because people can end up recreating what they believe rather than reflecting what is really in the data.²¹³

²⁰⁵ Id.; Watts & Stenner, *supra* note 33 at p. 103.

²⁰⁶ Id. at p. 139.

²⁰⁷ Id.

²⁰⁸ See Chapter 5, Section 4.3.1.2.

²⁰⁹ Watts & Stenner, *supra* note 33 at pp. 140-41.

²¹⁰ Id. at p. 140.

²¹¹ Id. at p. 141.

²¹² The factor estimate for each factor can actually be read from the Z scores alone. However, the factor array allows the researcher to look at the factor as a completed Q sort, which can be helpful when looking at the entire factor holistically.

²¹³ Danielson, *supra* note 1 at p. 32.

The goal of this exercise is to write a narrative that accurately tells the story that each factor represents. One of the most intriguing aspects of Q methodology is its pursuit of holism. This holism can only be understood if the different factors are interpreted in their entirety: that is, the researcher must look at the entire configuration holistically.²¹⁴ If the research merely looks at the statements in the factor that were most agreed with or most disagreed with, then there is not much to be gleaned from the information that is distinct from a survey or questionnaire. The uniqueness of Q methodology is drawn from the data that permits the researcher to look at all of the statements in relation to each other, and not in isolation.²¹⁵

Once the narratives have been drafted, the next step is to compare and contrast the distinct factors with each other.²¹⁶ A good place to start is by looking for widespread agreement across all factors.²¹⁷ These points of consensus may be essential to each factor. However, factors may also clash directly with one another or they may differ in non-confrontational ways.²¹⁸ A strong attribute of Q method is that each perspective has an importance score for each Q statement as represented through standardized Z scores. This allows direct comparison of the salience of specific themes across perspectives.²¹⁹ In the context of this work, it is the relationship between factors that is of most interest. In looking to find points of overlapping consensus, the researcher is looking to uncover surprising aspects of each factor that are consensually supported across some or all of the distinct factors.

4. Q METHODOLOGY AND LEGAL ANALYSIS

As a mode of empirical inquiry, Q methodology offers an interesting opportunity for studying those subjective aspects of legal decision and discourse that are so rarely amenable to the scientific method. The key insight of this lies in the claim that there are possibilities for linking the scientific study of subjectivity to jurisprudential thought. However, these possibilities are largely generated in the context of nonpositivistic theoretical frames because, for those jurisprudential outlooks that are strictly positivistic in the traditional sense, the subjective aspects of legal inquiry are purposefully marginalized. In all areas of positive thought, from the hard sciences to the social sciences and psychology, the merit of any theory is based on its ability to describe and explain objective phenomena from a third-person orientation.

²¹⁴ Watts & Stenner, *supra* note 33 at pp. 148-49.

²¹⁵ *Id.*

²¹⁶ Durning & Brown, *supra* note 141 at p. 542.

²¹⁷ Danielson, *supra* note 1 at p. 32.

²¹⁸ *Id.*

²¹⁹ Watts & Stenner, *supra* note 33 at pp. 148-49.

Nonpositive frames of inquiry are generally less rigid in the scope of analysis, and instead focus on the fact that all theories are human artifacts created for explaining and describing particular phenomena. They are inescapably subjective. It is only the human mind – from a self-referent and first-person perspective – that is capable of generating theoretical outlooks. An understanding that all theories possess these subjective aspects, even so-called objective scientific theories, is the hallmark of this work. This means that the study of subjectivity is relevant and salient for all theoretical outlooks, not just nonpositivist approaches.

However, it is likely that the acceptance of Q methodology as a means for measuring subjectivity will generate more sympathy among those theoreticians who believe that the law can never be reduced to purely logical and mathematical formulae. What is extremely interesting about Q methodology is that, despite its subjective subject-matter, the outcomes of Q method studies produce objective results. This may seem a bit counterintuitive, but since Q methodology provides a scientifically objective and rigorous means for the study of human subjectivity, there is little reason to prevent both positivistic and nonpositivistic jurisprudential outlooks from incorporating the findings of a Q method study into their analysis of the law.

4.1 Configurative Jurisprudence and Q Methodology

Q methodology provides a means for measuring perspectives. These are the subjective worldviews, viewpoints, demands, expectations, and identifications that all human beings bring to their endeavors: whether they be the most common daily conversations about the weather or of the highest intellectual musings of philosophers and scientists.²²⁰ Perspectives are subjective in that they always arise from a position of self-reference, and this is what Q methodology is able to hold steady for empirical analysis.²²¹

In the policy-orientated jurisprudence of the New Haven school, perspectives – or subjectivities – are a critical aspect of legal understanding.²²² According to such a view, law is a secular and human-made phenomenon that represents the means by which communities secure their common interest.²²³ It is a means for securing and protecting that which a particular community values.

²²⁰ Brown, *supra* note 3 at p. 10.

²²¹ Brown, *supra* note 5.

²²² Winston Nagan (2013). *Contextual-Configurative Jurisprudence: The Law, Science and Policies of Human Dignity*. Lake Mary, Vandeplas Publishing; Winston Nagan (2011). *Configurative Jurisprudence and the Clarification and Grounding of Values and Morality in Contemporary Theories of Justice*. World Academy of Art & Science, available at: <http://www.worldacademy.org/files/Configurative%20Jurisprudence%20and%20Contemporary%20Theories%20of%20Justice%20by%20Winston%20Nagan.pdf> (last accessed 1 September 2013).

²²³ Andrew Willard (1994). *The Scientific Study of Subjectivity and the Achievement of Human Rights*. *Operant Subjectivity*. Vol. 17, pp. 1, 16.

Such a view about the law is rooted in the idea that law refers to those human desires or wants that the politically relevant members of a community have decided to authoritatively protect and promote.²²⁴ It is a process of communication whereby legal decisions in their authoritatively and controlling form are chosen. It is about the flow of human communication (discourse) and the decisions that those with the authority to make such decisions secure the values that are shaped and shared by the community members that are subject to the law.²²⁵

Since values are subjective (in the sense that they emanate from a perspective of self-reference), an empirical means for measuring such self-referent values becomes a critical aspect of any nonpositivist jurisprudence; but is particularly relevant among New Haven scholars. One of the ongoing challenges for New Haven scholars is convincing positivistic schools of thought that value perspectives are capable of objective inquiry.²²⁶ The main claim of this work is that Q methodology – or the scientific study of human subjectivity – provides a means for gaining objective knowledge about subjective perspectives. If correct, Q methodology provides a crucial addendum to the New Haven school by offering a rigorous means for inquiry about perspective.

One of the main concerns of positive theories about law is that law – if permitted to include subjective perspectives about value – can easily come to describe and reflect the values of those with the power to make such decisions about what the law is and what it is not. This charge against realist or nonpositivist orientations about the law is that such a view is essentially law-denying in the objective sense as used in conventional positivism.²²⁷ Under such a view, law becomes the exclusive prerogative of the powerful. However, it is important to note that law and decision are not synonymous under a nonpositivist view of the law such as that of the New Haven school.²²⁸ If they were, law and power would be identical.²²⁹

Instead, it is only:

those decisions that are taken from a community-wide perspective of authority that we characterize as law. Accordingly, ‘authoritative decision’ is the most precise empirical referent of the term ‘law;’ and, if one is unhappy with how authoritative decision is operating and has the resources to attempt to change it, the way to do so is to influence

²²⁴ Id.

²²⁵ Id.

²²⁶ See generally Hengameh Saberi (2012). *Love It or Hate It, But for the Right Reasons: Pragmatism and the New Haven School’s International Law of Human Dignity*. Boston College International & Comparative Law Review. Vol. 35, pp. 59.

²²⁷ Nagan, *supra* note 222.

²²⁸ Willard, *supra* note 223 at pp. 16-17.

²²⁹ Id.

the processes of human activity that shape the prevailing structure of authoritative decision.²³⁰

Since authority is derived from community-wide expectations and perspectives about decision, it is these subjective community perspectives that become critical to one's understanding of what is law and what is not; and what it should be and what it should not be. The key lies in determining just what these community-wide perspectives are. Legal decisions that are perceived as reflecting the values of these community-wide perspectives are more likely to be accepted as authoritative because they embody a fair configuration of that which the subjects of a particular legal order value. Considering that values – especially moral and ethical values – are subjective, the task of the legal decisionmaker is difficult. In most cases, history and tradition mitigate this difficulty by allowing the decisionmaker to make determinations based on conformity with prior decisions. However, the law never stands still, and the values that users of the law embrace are constantly changing or evolving. This means that in some cases, it is not sufficient to merely rely on the mandate of conformity with prior decisions (precedent).

A more accurate theoretical frame of inquiry requires that the law be viewed as a process of subjective communication. As the eminent New Haven scholar Michael Reisman has described in a lecture titled *International Lawmaking: A Process of Communication*:²³¹

[a]ll communications involve the mediation of subjectivities . . . While much of general communications may . . . be relevant to law formation, what is distinctive about perspective or lawmaking communications is that rather than transmitting a single message, they carry simultaneously three coordinate communication flows in a fashion akin to the coaxial cable of modern telephonic communications. The three flows may be briefly referred to as the policy content, the authority signal, and the control intention. Unless each of these flows is present and effectively mediated to the relevant audience, a prescription will not result. Equally important, even if the three components are initially communicated, they must continue to be communicated for the prescription, as such, to endure; if one or more of the components should cease to be communicated, the prescription undergoes a type of desuetude and is terminated. Let us consider each of these communication flows in more detail. The content of a prescription, the norm – the injunction that one ought to do or refrain from doing something, or, writ large, the policy about the production and distribution of some value – is obviously an important component . . . The authority signal is much more complex than the communication of policy content. While the command of what to do is essentially unilinear, the communication of authority is more of a closed loop. It is the audience, whether or not its members realize it, that endows the prescriber with the authority that renders his

²³⁰ Id.

²³¹ Michael Reisman (1981). *International Lawmaking: A Process of Communication*. American Society of International Law Proceedings. Vol. 71, pp. 101, 108-11.

communication prescription. Hence the search for authority must be empirical in the broadest sense, rather than merely documentary. In many circumstances, authority may be subtle and diffuse. But its indispensability in prescription is clear. We now address the third communications flow. One of the sillier notions that surfaces in jurisprudence with an almost idiosyncratic regularity is that lawmaking is essentially a polite ethical conversation, a dialogue requiring only content and authority . . . If that were the case, we would maintain cadres of philosophers and rhetoricians instead of police, armies, and other specialists in violence. Plainly, lawmaking involves another component; power, the capacity and willingness to make a preferential expression effective. This third component . . . we prefer to call the communication of control intention.²³²

What this theoretical outlook means for the application of Q methodology is its orientation towards an understanding of the law that is rooted in the communicability of various flows that are empirically observable. Although many of these perspectives are subjective – and not merely documentary as Reisman notes, they are amenable nonetheless to observation.²³³ It is these observable communication flows that can make up the concourse of any Q method study. The ongoing flow of communication about policy content, authority signal, and control intention that makes law law is a result of the various perspectives among both: 1) the political elites making the law, and 2) the subjects of that law interacting reciprocally in a tug of war about which values should be embodied in an prescription that becomes law. It is the subjective perspectives about these communications among lawmakers and lawtakers alike that ought to be the focus of any theoretical inquiry about the law. There are various empirical methods for gaining knowledge and insights about these perspectives, but Q methodology may be the most well suited for measuring these flows of communications that make up the legal process.

4.2 Shared Subjectivity and Value Consensus

For a theory of configurative fairness, which is built upon the theoretical foundation of the New Haven school of jurisprudence, gaining knowledge about subjective value perspectives is a critical component for the configuration of any legal order that is perceived as fair by both lawmakers and lawtakers. The discovery of these value perspectives is difficult to conduct empirically from a third-person or objective orientation because it forces the observer to make judgments about the first-person perspectives of others. Often this will result in empirical knowledge that is influenced by the person making the observations and not the observee themselves.

Q methodology helps mitigate this problem by preserving first-person perspectives exactly as they have been reflected upon by the person actually

²³² Id at pp. 108-11.

²³³ Id. at p. 110.

participating in the Q method study. This innovative aspect of Q methodology allows the person observing the results of a Q method study to see those first-person perspectives in empirical form. What this means for legal theory is that the decisionmaker or scholar making inquiries about the law will have first-person empirical knowledge about value perspectives and preferences that can be used to inform and shape the way in which the law develops.

Values are subjective, but they are not idiosyncratic and unique. Often, value perspectives are shared. In a typical Q method study, perspectives on any particular topic tend to cluster around a small number of factors that represent shared ways of thinking. Despite the fact that the perspectives (as articulated through the process of completing a Q sort) of each individual in a Q method study have the potential to be unique, the viewpoints expressed – in actuality – are in most cases shared. It is these shared subjectivities that become empirically observable through Q methodology. Shared subjective perspectives when viewed through the lens of Q methodology may actually meet the test for objectivity, but will depend on the willingness of the legal community to embrace Q methodology as an empirical research tool.²³⁴

A theory of configurative fairness holds that fair legal orders can be constructed, if and only if, its legal rules and procedures reflect a fair and acceptable distribution of the values its participants endorse. As a subjective phenomenon, value knowledge is difficult to pin down. However, with the use of Q methodology, there are new possibilities for gaining knowledge about what value preferences and claims are shared by users of a particular legal order. Despite their subjective nature, Q methodology can assist in uncovering areas of consensus among a population of individuals in regard to the value positions that they hold on a particular legal topic.

The empirical insight that such data can provide will permit the legal decisionmaker or scholar to determine what values are most compatible with the common interest.²³⁵ While a pure value consensus is unlikely to ever occur in controversial areas of legal development, there is the possibility that the conflicting claims to value that individuals pursue will carry some degree of overlap. It is these areas of overlapping consensus that a theory of configurative fairness is most interested in discovering scientifically and empirically. Such a position is one holding that, from a legal regime-building perspective, conflicts between the diverse value claims and demands that will arise in the development of any legal order can be resolved by looking at the areas of overlapping consensus among conflicting parties. Such an overlapping consensus lays the groundwork for a fair configuration of any legal order because it establishes a foundation of agreed values that are acceptable to all users of a particular legal order.

²³⁴ Nagan, *supra* note 222.

²³⁵ Willard, *supra* note 223 at p. 16.

CHAPTER 7

INVESTMENT TREATY ARBITRATION AND ITS DISCONTENTS

1. INTRODUCTION

This Chapter will introduce a currently evolving international legal order whose specific subject-matter will be used in the application of Q methodology and a theory of configurative fairness: investment treaty arbitration. Since the theory and method for configuring evolving legal orders proposed in this work is necessarily general and abstract, it is important to apply it to a specific legal regime or system that is currently in a state of evolutionary flux. To do this, a survey of the value perspectives and choices that users of investment treaty arbitration currently endorse will be described and evaluated. Before turning to the Q method study on configuring fairness in investment treaty arbitration, which is the subject of the following Chapter, this Chapter will discuss the evolution of investment treaty arbitration in historical perspective with a special emphasis on the legitimacy and fairness discourse that has developed in the last decade. The purpose and object of such a Chapter is to bring attention to the particular design issues that evolving international legal orders face when attempting to distribute values across a global community of users with diverse interests, preferences, and expectations; and how these diverse perspectives manifest themselves as subjective claims about value.

Since the development of any legal order is based on social choice and historical context, it is difficult to evaluate such development as a static set of objectively determined legal rules and procedures isolated from the value choices that human beings have made over time. Investment treaty arbitration is such a legal order whose development has ebbed and flowed in response to larger social and political events. However, by looking at the past and present choices about the distribution of values in investment treaty arbitration (as opposed to just positive rules and procedures), one may be able to identify some of the value choices that users of investment treaty arbitration want its legal rules and procedures to protect in the future. While the Q method study applied in this work is specifically designed to provide empirical data in this regard, a background description and evaluation of investment treaty arbitration is warranted. However, it is important to note that the scope of this Chapter is not intended to exhaustively analyze and discuss all of the substantive and procedural aspects of investment treaty arbitration; rather, the purpose of this Chapter will be exclusively focused on surveying the legitimacy and fairness discourse about investment treaty arbitration that has occurred in the literature. In other words, this Chapter will aim at examining and describing how the legitimacy and fairness discourse about investment treaty arbitration has developed over time.

Investment treaty arbitration is a specialized form of international adjudication that combines many aspects of both public and private international law. Investment treaty arbitration can be categorized as a specific regime or system;¹ or as a part of a larger legal order typically called international investment law or the international law on foreign investment.² International investment law, in historical context, has been concerned with the legal rules and procedure for the protection of foreign direct investment. However, while many aspects of international investment law have only developed in the past hundred years or so, its roots can be traced back centuries to the rules and principles of international law that deal with the general rights and obligations of foreign aliens.³

The modern or contemporary international investment law regime is primarily a treaty-based legal order that is contained in a large number of bilateral investment treaties (BITs),⁴ plurilateral investment treaties,⁵ and free trade agreements (FTAs) with investment chapters.⁶ However, there remain constituent parts of international investment law outside of the treaty context. These include the customary international law rules on foreign direct investment, national laws on foreign investment, legal rules of international administrative bodies, and private international law rules for commercial arbitration and transnational contracts.

International investment treaty law forms a significant part of international investment law, and investment treaty arbitration forms a significant part of

¹ Jeswald Salacuse (2010). *The Emerging Global Regime for Investment*. Harvard International Law Journal. Vol. 51, p. 428.

² For a good overview of international investment law, see Rudolf Dolzer & Christoph Schreuer (2012). *Principles of International Investment Law, Second Edition*. Oxford, OUP; José Alvarez (2011). *The Public International Law Regime Governing International Investment*. The Hague, Pocketbooks of the Hague Academy of International Law; Jeswald Salacuse (2010). *The Law of International Investment Treaties*. Oxford, OUP; Muthucumaraswamy Sornarajah (2010). *The International Law on Foreign Investment, Third Edition*. Cambridge, CUP; Peter Cameron (2010). *International Energy Investment Law: The Pursuit of Stability*. Oxford, OUP; Zachary Douglas (2009). *The International Law of Investment Claims*. Cambridge, CUP; August Reinisch (2008). *Standards of Protection in International Investment Law*. Oxford, OUP; Campbell McLachlan, et al. (2007). *International Investment Arbitration: Substantive Principles*. Oxford, OUP.

³ Sornarajah, supra note 2 at p.18.

⁴ The United Nations (UN) Conference on Trade & Development (UNCTAD) maintains a database of all available BITs. See *Investment Treaties Online*, available at: http://www.unctadxi.org/templates/DocSearch____779.aspx (last accessed 1 September 2013).

⁵ A prominent example of this type is treaty includes: the *Energy Charter Treaty & Its Protocol on Energy Efficiency & Related Environmental Aspects (ECT)*. 17 December 1994, 34 ILM 360 (1995).

⁶ Prominent examples of these types of treaties include: the *North American Free Trade Agreement (NAFTA)*. 17 December 1992, 32 ILM 289 (1993); the *Association of South-East Asian Nations (ASEAN) Agreement for the Promotion & Protection of Investments*. 15 December 1987, 27 ILM 612 (1987); the *Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR)*. 4 August 2004, available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (last accessed 1 September 2013); the *Investment Agreement for the Common Market for Eastern & Southern Africa (COMESA) Common Investment Area*, 23 May 2007.

international investment treaty law. The subject-matter focus of this work pertains specifically to the adjudicative design issues of investment treaty arbitration, and while broader considerations of international investment law will obviously be entangled, the primary focus is on the regime-design issues related to this very specific form of international adjudication.

Investment treaty arbitration is a fairly recent phenomenon. It is only in the past fifty years that investment treaty arbitration has even been possible. While the first BIT was signed in 1959,⁷ the first BIT that permits investor-state arbitration was not signed until 1969.⁸ Prior to this, there was no mechanism for investment treaty arbitration as it is currently practiced. While there have long been examples of dispute settlement provisions being embedded in various types of treaties signed by states, the specific type of adjudication permitted in BITs and FTA investment chapters is new. And not only is investment treaty arbitration new, it comprises a completely novel form of international adjudication.⁹

Most typically, international dispute settlement mechanisms are in the state-to-state context, whereby parties to a dispute are exclusively states or state entities. Investment treaty arbitration is different. It permits private individuals, companies, and shareholders of one state party to a BIT or FTA to bring a claim for breach of the BIT or FTA directly against another state party to the BIT or FTA. The only comparable international legal institutions currently in place that permits individual claimants are the regional human rights courts.¹⁰ While the jurisdiction of these courts permits nonstate entities as claimants against states, there are significant differences. Primarily, these courts are permanent bodies with tribunals consisting of permanent judges, and generally speaking, these judges only hear cases arising out of breaches to the treaty once local remedies have been exhausted.¹¹

Investment treaty arbitration on the other hand merely presents a foreign investor with a standing offer to arbitrate a dispute should a treaty breach

⁷ *Treaty for Promotion & Protection of Investment Between West Germany & Pakistan (Pakistan-Germany BIT)*. 25 November 1959, 457 UNTS 23 (1959).

⁸ *Chad-Italy Bilateral Investment Treaty* (1969). See Andrew Newcombe & Luis Paradell (2009). *The Practice of Investment Treaties: Standards of Treatment*. The Hague, Kluwer, p. 45. All of the BITs signed in the period between 1959 and 1968 included dispute settlement provisions, if at all, that resembled the provisions in early FCN treaties (i.e. mechanisms for diplomatic espousal).

⁹ See generally Jan Paulsson (1995). *Arbitration Without Privity*. ICSID Review. Vol. 10, p. 232.

¹⁰ These include the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights.

¹¹ Article 35 § 1 of the [European] *Convention for the Protection of Human Rights and Fundamental Freedoms* states: “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.” See [European] *Convention for the Protection of Human Rights & Fundamental Freedoms*. 4 November 1950, 213 UNTS 221 (1950).

occur;¹² and often does not require an exhaustion of local remedies before initiating an action.¹³ The structure of such a system of adjudication means that arbitrations arising out of breaches of the underlying BIT or FTA will be composed on an ad hoc basis with relative autonomy from other disputes arising out of other treaties. So not only does investment treaty arbitration diverge from the tradition of international legal disputes only permitting state parties to make claims, it also diverges from the traditional concept of public judicial organization (that is, it allows for one-off, or ad hoc, arbitral tribunals to render decisions).

It is this fundamental architecture of investment treaty arbitration that has generated both criticism and praise. However, with any new phenomenon, there is a significant period where the exact parameters or ‘rules of the game’ must be determined. Investment treaty arbitration is currently in this period. Due to the fact that investment treaty arbitration is both new and novel, opinions about its function, purpose, and applicability remain active. Since most of these questions about investment treaty arbitration are based on the specific preferences of individuals and states who espouse them, the nature of the discourse is necessarily subjective. There is no single right answer to the design of investment treaty arbitration in international law. The evolution or devolution of investment treaty arbitration over the next decades will reflect the discourse among users of this system of adjudication, and how the underlying values of these users are distributed through the ongoing process of legal decisionmaking.

This Chapter will begin with a historical description of the international law on the protection of foreign aliens. It will then describe the contemporary investment treaty regime with emphasis on the dispute settlement mechanisms embedded in BITs and other international investment agreements (IIAs). The final part of the Chapter will discuss the waves of legitimacy and fairness discourse that have developed over the past decade.

2. THE LAW ON THE PROTECTION OF FOREIGN ALIENS

As stated in the introduction, international investment law grew out of the broader category of international law relating to the treatment of foreign aliens. Typically, an alien residing in a foreign sovereign territory will be subject primarily to the laws and customs of the state in which he or she is residing. This hardly seems controversial given the dominance of the modern state system that governs the world today; and yet, it is common for specific

¹² Paulsson, *supra* note 9.

¹³ George Foster (2011). *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*. Columbia Journal of Transnational Law. Vol. 49, pp. 201, 211-12, 251.

issues to arise. Primarily, these issues pertain to the rules of international law that protect foreign aliens from domestic rules and procedures that fall below a minimum international standard of treatment.¹⁴ The default rule is that the foreign alien is subject to the law of the state where he or she is residing unless the applications of such laws fall below a minimum standard.¹⁵ However, even if the foreign alien has been treated in a manner below the minimum standard, how does he or she gain recourse to the law if individuals or companies are not directly subject to international law?

Until very recently, the customary international law on diplomatic protection has provided a good answer for this question. Diplomatic protection permits the home state of a foreign alien to espouse a claim against the state where the foreign alien was injured. In the past two hundred years, diplomatic protection claims have been espoused three ways: 1) directly between the governments of the home state of the foreign alien and the state where the injury occurred, 2) as legal proceedings before the International Court of Justice (ICJ)¹⁶ and its predecessor, the Permanent Court of International Justice (PCIJ),¹⁷ and 3) through the establishment of international claims commissions.¹⁸

¹⁴ Elihu Root (1910). *The Basis of Protection to Citizens Residing Abroad*. American Journal of International Law. Vol. 4, p. 517; Edwin Borchard (1940). *The Minimum Standard of Treatment of Aliens*. Michigan Law Review. Vol. 38, p. 445.

¹⁵ In recent years, the international minimum standard has been pegged (at times, controversially) to the *Neer Case*, which stated: “[w]ithout attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *LFH Neer & Pauline Neer (US) v. United Mexican States*. 15 October 1926, 4 UNRIAA 60 (1926); see also *BE Chattrin (US) v. United Mexican States*. 23 July 1927, 4 UNRIAA 282 (1927) (Mexico-US General Claims Commission).

¹⁶ These prominently include: the *Nottebohm Case (Liechtenstein v. Guatemala)*. ICJ Reports 4 (1955); the *Interhandel Case (Switzerland v. US)*. ICJ Reports 176 (1957); the *Barcelona Traction, Light, & Power Case (Belgium v. Spain)*, Second Phase. ICJ Reports 4 (1970); the *Elettronica Sicula (ELSI) Case (US v. Italy)*. ICJ Reports 15 (1989); the *La Grand Case (Germany v. US)*. ICJ Reports 263 (2001); the *Avena & Other Mexican Nationals Case (Mexico v. US)*. ICJ Reports 12 (2004); the *Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)*. ICJ Reports 639 (2010).

¹⁷ These prominently include: the *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom (UK))*. PCIJ Series A, No. 2 (1924); the *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*. PCIJ Series A, No. 10 (1926); the *Factory at Chorzów Case (Germany v. Poland)*. PCIJ Series A, No. 17 (1928); the *Case Concerning the Payment of Various Serbian Loans (France v. Serb-Croat-Slovene State)*. PCIJ Series A, Nos. 20/21 (1929); the *Oscar Chinn Case (UK v. Belgium)*. PCIJ Series A/B, No. 63 (1934).

¹⁸ “It is not far-fetched to say that international claims commissions served as the cradle of public international law as a professional practice; indeed, until the Jay Treaty arbitrations in the 1790s, public international law was largely an academic discipline, hardly distinguishable from political philosophy or diplomacy. The Jay Treaty arbitrations marked the beginning of a long line of development, which reached its ‘high noon’ around the year 1900 and continued until well after World War I. During this period, ad hoc inter-state arbitration became the dominant method of resolving international claims, and ad hoc arbitrations such as the

Diplomatic protection claims brought through judicial proceedings do not permit direct rights of action by injured aliens against the state where the injury occurred. Rather, the claim must be espoused by the home state of the foreign alien. This means that once the action is initiated by the home state of the injured alien, the claim is the exclusive claim of the state initiating the action. The PCIJ made this clear in its pronouncement on the nature of diplomatic protection in the *Mavrommatis Palestine Concessions Case*:

[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.¹⁹

Diplomatic protection claims in international law can thus be seen as a derivative right of action for the foreign alien.²⁰ An individual must first convince the government to which he or she is a national that a claim should be brought on his or her behalf against the state where the injury occurred. For these reasons, judicial proceedings based on diplomatic protection claims have been relatively rare. There are about a dozen cases that have been litigated before the ICJ²¹ or PCIJ,²² and while claims commissions were especially popular in the nineteenth century and early twentieth century (through the First World War), their use in the past fifty years has been more limited.²³ While these types of derivative (diplomatic protection) claims can be seen as a progressive step away from earlier uses of so-called ‘gunboat

Alabama arbitration and the many awards of international claims commissions such as the United States-Mexican Claims Commissions, the various claims commissions involving South American countries such as Venezuela, Peru, Chile, and Brazil, and the ‘Boxer Commission’ in China, became to be known as the early leading cases in international law. In a comprehensive survey, A.M. Sruyt has catalogued around 380 international arbitrations that were conducted during the period 1776-1925.” Veijo Heiskanen (2009). ‘Arbitrating Mass Investor Claims: Lessons of International Claims Commissions,’ in Belinda Macmahon, ed. *Multiple Party Actions in International Arbitration: Consent, Procedure, and Enforcement*. Oxford, OUP, pp. 297, 299.

¹⁹ The *Mavrommatis Palestine Concessions Case*, supra note 17.

²⁰ Zachary Douglas (2004). *The Hybrid Foundations of Investment Treaty Arbitration*. British Yearbook of International Law. Vol. 74, p. 151.

²¹ See supra note 16.

²² See supra note 17.

²³ These claims commissions have been almost exclusively been established as a judicial remedy for damages relating to acts of war or revolution. Generally speaking, these commissions include: the Iran-US Claims Tribunal, the United Nations Compensation Commission (UNCC), the Eritrea-Ethiopia Claims Commission, the Claims Programs in Bosnia and Kosovo, Claims Resolution for Dormant Accounts in Switzerland, the Iraq Property Claims Commission, and the Property Claims Commission of the German Foundation. See Heiskanen, supra note 18 at pp. 297-303.

diplomacy,²⁴ developments in the past fifty years have moved even further towards peaceful models of international adjudication as a substitute for threats of political or military violence as a means for resolving disputes involving injuries to foreign aliens (that is, through an increasing number of investment treaty arbitration cases).

In this recent period, the traditional use of diplomatic protection or espousal for remedying injuries to foreign aliens has largely been replaced by the dispute settlement provisions in BITs and FTAs. Since the first BIT was signed, there have only been three cases involving diplomatic espousal cases related to foreign direct investment that have been brought before the ICJ.²⁵ In contradistinction to the traditional model of diplomatic espousal, the current dispute settlement provisions in the modern BIT regime permit direct rights of action to be brought against states for breaches to the underlying treaty.²⁶ There is no requirement for the foreign alien or company to first seek the permission of the state to which it is a national before initiating a claim.²⁷ As will be noted in the following section, the fundamental basis of modern investment treaty arbitration grew out of this shift away from the customary international law on diplomatic protection, and as such, investment treaty arbitration envisions an entirely new form of dispute resolution in international law.

Before turning to the contemporary practice of investment treaty arbitration, it is relevant to mention the substantive rules that protected foreign aliens prior to the development of the modern investment treaty regime. Primarily, these are rules derived from customary international law, as well as, so-called friendship, commerce, and navigation (FCN) treaties.²⁸ These types of rules are important because customary international law rules²⁹ continue to apply in

²⁴ See the section titled, 'The End of Gunboat Diplomacy,' in Santiago Montt (2009). *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*. Oxford, Hart Publishing, pp. 48-55.

²⁵ These include: the *Barcelona Traction Case (Belgium v. Spain)*, the *ELSI Case (US v. Italy)*, and the *Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)*. See *supra* note 16.

²⁶ Douglas, *supra* note 20 at pp. 167-83.

²⁷ *Id.*

²⁸ FCN treaties can be viewed as forerunners to the modern BIT regime. See Michael Reisman & Robert Sloane (2004). *Indirect Expropriation and its Valuation in the BIT Generation*. British Yearbook of International Law. Vol. 75, p. 116.

²⁹ Most prominently, these include: the rules of treaty interpretation; the principles of good faith, *pacta sunt servanda*, *rebus sic stantibus*, and *estoppel*; rules on compensation for expropriation; the minimum standard of treatment; the exhaustion of local remedies; and the rules on state responsibility for international wrongs, including the doctrine of necessity. Of course there are other rules of customary international law applicable to investment treaty arbitration claims, but these aforementioned rules provide a good basic list of rules that have repeatedly played a role in the settlement of investor-state disputes.

investment treaty arbitrations, and many provisions found in the substantive rules of BITs can be traced to earlier provision provided in FCN treaties.³⁰

Unlike customary rules, the substantive provisions of FCN treaties have largely been replaced by the modern BIT and FTA regimes; and as such, they do not continue to play a prominent role in the settlement of investor-state disputes. However, many of the provisions in FCN treaties have been transplanted into the modern BIT regime and thus remain historically valid as a precursor to many of the rights granted in BITs.³¹ One of the main deficits in FCN treaties – and other earlier treaties relating to foreign economic relations – is that they did not contain dispute settlement provisions permitting direct rights of action. The invocation of the rights granted to foreign aliens under these types of treaties required recourse to traditional means of diplomatic protection. For example, one of the few modern diplomatic protection cases before the ICJ was the *ELSI Case*,³² which was based on provisions in the FCN treaty between the US and Italy.

This brief introduction has described two fairly recent developments in the realm of the international law on the protection of foreign aliens. First, the modern BIT regime shifts away from the traditional derivative rights of action permitted under the customary rules of diplomatic protection, and instead moves to a right of direct action that permits foreign aliens to seek remedies for international wrongs without the need for governmental espousal. Secondly, the modern BIT regime shifts away from the traditional rules on the protection of foreign aliens generally, and instead focuses on the protection and promotion of foreign direct investment made by alien investors. Thus, the modern BIT regime has reduced protections from the broad category of foreign aliens to the narrower category of foreign investors, while at the same time greatly expanding the ability of foreign investors to bring claims arising out of international wrongs (that is, through direct access to investment treaty arbitration).

3. THE MODERN INVESTMENT TREATY REGIME

The modern investment treaty regime prominently includes dispute settlement provisions allowing for direct rights of action by a foreign investor against the state hosting such investments. In fact, it is such a prominent feature of the modern regime that one could hardly imagine that the recent proliferation of the discourse on BITs and FTA investment chapters would have emerged without the practice of investment treaty arbitration. However, investment

³⁰ While FCNs were primarily developed by the US, it appears that many early BITs (not only US BITs) borrowed some of their language from US FCN treaties.

³¹ See Soranrajah, *supra* note 2 at pp. 180-81.

³² See the *ELSI Case (US v. Italy)*, *supra* note 16.

treaty tribunals are a very recent phenomenon, only emerging *significantly* in the past twenty years. This mid-1990s starting point in the increase in investment treaty arbitrations coincides with the proliferations of BITs that began in the late 1980s. Up until the late 1980s, the cumulative number of BITs signed globally was less than 500.³³ By the end of the 1990s, a decade later, that number had increased to over 2000.³⁴

While the number of BITs being signed has tapered off in the past decade, they do continue to be negotiated at a fairly rapid rate. The latest numbers from the UNCTAD *World Investment Report 2013* claim that the universe of total BITs signed had reached 2857 by the end of 2012.³⁵ This number does not count an additional 339 IIAs, which include the increasing number of FTAs with investment chapters (the total universe of investment agreements being 3196).³⁶ Most of these treaties include provisions for investor-state dispute settlement. However, the exact form of the dispute settlement provisions tends to differ from treaty to treaty. By the end of 2012, there were 512 known investment treaty arbitrations that had been initiated;³⁷ and where BIT negotiations have slowed in number over the past decade, the number of investment treaty arbitrations has continued to increase, with approximately 40 cases being initiated each year in the period between 2002 and 2011;³⁸ and most notably, 58 investor-state claims were initiated in 2012, which constitutes the largest number of cases to date that have been filed in a single year.³⁹

3.1 The Beginnings

As stated, the first BIT was signed in 1959 between Germany and Pakistan.⁴⁰ While this BIT is mostly remembered for being the first (in fact, it is no longer in force as it was replaced by a newer treaty in 2007), it is indicative of some of the debates that have developed in recent years. Most importantly, it is a treaty initiated by Germany. This is a trend that persisted in the early days of the BIT generation: the signing of BITs were primarily driven by capital-exporting countries in an effort to protect foreign investors in the states where they are investing. The typical BIT calls for the ‘encouragement and reciprocal

³³ James Zahn, et al. (2012). *World Investment Report 2012*. Geneva, UNCTAD, fig. III.2.

³⁴ Id.

³⁵ James Zahn, et al. (2013). *World Investment Report 2013*. Geneva, UNCTAD, p. 104.

³⁶ Id. However, these numbers do not include a large number of double taxation treaties (DTTs) that are sometimes included in the total number of IIAs.

³⁷ Id. at p. 110.

³⁸ Zahn, *supra* note 33 at p. 84; see also the ICSID website, available at: <https://icsid.worldbank.org/ICSID/Index.jsp> (last accessed 1 September 2013).

³⁹ Zahn, *supra* note 37.

⁴⁰ *Pakistan-Germany BIT*, *supra* note 7.

protection of investment,⁴¹ but it is the *protection* of foreign direct investment by citizens and companies residing in capital-exporting states that motivated the initial proliferation of BITs. Capital-importing states certainly saw the signing of BITs with capital-exporting states – at least theoretical – as signifying a desire to promote, support, and encourage foreign direct investment in their countries. However, the early negotiations of BITs appear to have been initiated by capital-exporting countries. While this unidirectional explanation of BIT negotiations no longer reflects the reality, it is a perception that continues to flourish, and with negative effects. Many critics of the investment regime continue to view the proliferation of BITs along north-south lines even though it is now common practice to see BIT negotiations between two traditionally capital-importing states.⁴²

Another reason why the *Pakistan-Germany BIT* is indicative of the overall BIT regime is that the treaties are bilateral in nature. There is a current trend to incorporate investment protection measures in plurilateral FTAs, but the majority of investment treaties are bilateral. It can be assumed that there are two main reasons why Germany was the first to embark on a BIT program in the years after the Second World War (although other European states also had early BIT programs).⁴³ First, the experience of Germany losing two world wars in the span of three decades, and the reparations it had to make in the aftermath of such losses, could be seen as a key driver in its efforts to provide future security for its foreign investors.

Secondly, Germany had no choice but to enter into bilateral treaties for the protection and promotion of foreign direct investment. In the aftermath of the Second World War, the Bretton Woods conference⁴⁴ created new structures for global regimes to promote economic development (the World Bank), stabilize global financial systems (the International Monetary Fund (IMF)), and to liberalize global trade (the *General Agreement on Tariffs and Trade (GATT)*).⁴⁵ Although there was an attempt at including some foreign direct investment provisions in the proposed International Trade Organization (ITO),⁴⁶ it did not survive the conference. Coupled with other past failed attempts to develop a multilateral framework for the protection of foreign direct investment,⁴⁷ states

⁴¹ See e.g. *Agreement on Encouragement & Reciprocal Protection of Investments Between the Kingdom of the Netherlands & the Republic of Venezuela (Netherlands-Venezuela BIT)*. 21 October 1991.

⁴² James Zahn, et al. (2005). *South-South Cooperation in International Investment Arrangements*. Geneva, UNCTAD; see also Lauge Poulsen (2010). *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*. Northwestern Journal of International Law & Business. Vol. 30, p. 101.

⁴³ See Newcombe & Paradell, *supra* note 8 at pp. 44-46.

⁴⁴ *Bretton Woods Agreement*. 22 July 1944.

⁴⁵ *The General Agreement on Tariffs & Trade (GATT)*. 30 October 1947, 55 UNTS 187 (1947).

⁴⁶ *The Havana Charter for an International Trade Organization (ITO)*. 24 March 1948, UN Conference on Trade & Employment, UN Doc. E/CONF.2/78 (1948).

⁴⁷ In addition to the ITO, there were a number of pre-BIT attempts at multilateralizing international investment law. See *Responsibility of States for Damage Done in Their Territory to*

were left with no choice but to 'go it alone' if they wanted an international legal mechanism for protecting their investors operating abroad.

3.2 Decolonization and the New International Economic Order

However, within the first decade after the signing of the first BIT, the process of decolonization had reached its apex; and the political movements in the decades following this process tempered the likelihood that newly independent countries would be clamoring to sign BITs. During the colonial era, the imperial powers were able to protect the investments of their citizens by extending their sovereign control over colonial territories. Foreign investment in the colonies was not really foreign at all (at least not foreign capital initiating in the imperial state of that colony). There was little need for international legal protections distinct from the legal protections already available to the foreign aliens (that is, citizens of the imperial state) operating within the territory of the colony.

Obviously, this changed considerably when the colonial powers exited and these states gained independence. All of a sudden, newly independent states had a seemingly untenable dilemma. On the one hand, they almost universally wanted to denounce their historical oppression from colonial powers by declaring that foreigners residing or investing within the sovereign territory of these newly formed states would not be afforded any special rights independent of the rights granted to nationals. On the other hand, many of these newly formed governments believed that they needed outside capital and expertise to develop their economies; and that they needed to offer special incentives in order to entice foreign capital back into their countries. It is this struggle between state autonomy and the pursuit of foreign capital that continues to underlie many of the current debates surrounding the role of international law in regulating the economic policies of states.

The initial response of these former colonies, beginning in the 1960s and culminating in the mid-1970s, was to assert a policy through the United Nations (UN) General Assembly (GA) declaring their 'permanent sovereignty over natural resources' (PSNR)⁴⁸ in what later came to be described as the New

the Person or Property of Foreigners. League of Nations, Report of the Subcommittee, Doc. C.196. M.70.1927.V (1929); *Draft Statutes of the Arbitral Tribunal for Foreign Investment & the Foreign Investment Court*. International Law Association (ILA) (1948); *International Code of Fair Treatment of Foreign Investment*. International Chamber of Commerce (ICC), ICC Pub. No. 129 (1949).

⁴⁸ *Right to Exploit Freely Natural Wealth & Resources*. 21 December 1952, UNGA Resolution No. 626; *Permanent Sovereignty Over Natural Resources (PSNR)*. 14 December 1962, UNGA Resolution No. 1803; *Permanent Sovereignty Over Natural Resources (PSNR)*. 17 December 1973, UNGA Resolution No. 3171.

International Economic Order (NIEO).⁴⁹ What these declarations proposed, *inter alia*, was to assert that sovereign states had the autonomy to shape their own policies on how foreign investors would be treated within their territory. Many of the former colonies were (are) rich in resources, and they believed that – as newly independent states – those resources were exclusively theirs to exploit; and that the nationalization of natural resource operations was not only legal, but that such actions did not require compensation commensurate with the customary international law standard.⁵⁰

While the decolonization process was the primary driver in asserting such a NIEO, there were two earlier developments that led these newly independent states to assert their claims at the UN in the way that they did. The first development is traceable to the perspective that some Latin American states already had developed in the nineteenth century through the work of jurists such as Carlos Calvo.⁵¹ The so-called Calvo doctrine is a principle holding that foreign aliens would be granted the same protections as nationals; and that given this kind of non-discriminatory treatment, a foreign alien must waive diplomatic protection by the state to which he or she is a citizen.⁵²

The second development is attributable to the so-called Hull rule, which derives from a diplomatic exchange between US Secretary of State Cordell Hull and his Mexican counterpart in the 1930s.⁵³ The Hull rule, which builds on the early jurisprudence of the PCIJ,⁵⁴ has long been considered to state the customary international rule on compensation for expropriation, and requires that:

no government is entitled to expropriate private property [of a foreign alien], for whatever purpose, without provision for prompt, adequate and effective payment therefore.⁵⁵

While neither the Calvo doctrine nor the Hull rule are explicitly mentioned in the resolutions of the NIEO, they played an underlying role in justifying the positions of many former colonial states. The NIEO envisioned a world of states where the Hull rule would be rejected and the Calvo doctrine endorsed. In other words, foreign investors would be subject to the rules of the state where they were residing and that international law and diplomatic intervention could not alter the choices that a sovereign state makes in structuring its economic development policies.

⁴⁹ *Declaration on the Establishment of a New International Economic Order (NIEO)*. 1 May 1974. UNGA Resolution No. 3201.

⁵⁰ *Id.*

⁵¹ Carlos Calvo (1869). *Derecho Internacional Teorico y Practico de Europe y America*. Paris, d'Amyot.

⁵² See Montt, *supra* note 24 at pp. 55-62.

⁵³ Frank Dawson & Burns Weston (1962). *Prompt, Adequate and Effective: A Universal Standard of Compensation?* Fordham Law Review. Vol. 30, pp. 727, 733-34.

⁵⁴ Particularly, the jurisprudence of the *Factory at Chorzów Case (Germany v. Poland)*, *supra* note 17.

⁵⁵ Reprinted in Green Hackworth (1942). *Digest of International Law*. Vol. 3, pp. 658-59.

3.3 ICSID, the Middle East Arbitrations, and the Iranian Revolution

Unsurprisingly, few BITs were signed or negotiated during this decolonization period.⁵⁶ However, there were a number of developments that evolved during the period of the NIEO that continue to play a role in investment treaty arbitration today. These include the signing of the *International Centre for the Settlement of Investment Disputes (ICSID) Convention* (also known as the *Washington Convention*) in 1965,⁵⁷ the Middle Eastern oil arbitrations, and the Iranian Revolution of 1979.

The *ICSID Convention*, through the leadership of World Bank general counsel, Aron Broches, established the International Centre for the Settlement of Investment Disputes. The *ICSID Convention* provides a procedural mechanism for the arbitration of disputes arising between a state and a foreign investor.⁵⁸ The key purpose of the *ICSID Convention* is to provide an institution for the arbitration of investor-state disputes that would both internationalize contracts and be able to overcome many of the problems relating to the enforcement of arbitral awards against states.

Contract-based commercial arbitration has always been an option for foreign investors doing business with states or state entities. However, when a contract-based dispute arises, the issue of enforcement against a state presents special problems. Even if a commercial arbitration award is rendered against a state party, it is still likely to be subject to one of the treaties on the recognition and enforcement of arbitral awards.⁵⁹ As such, the fact that one party to the dispute is a sovereign state, there is always the possibility that sovereign immunity issues could arise, or that the local enforcing court would refuse to enforce award against its own government. The *ICSID Convention* attempted to remedy this situation by creating a binding international treaty that could produce final awards that were directly enforceable against states without recourse to domestic judiciaries.

While the preparatory works of the *ICSID Convention* envisioned the possibility of BIT-based arbitrations, its primary focus was on contract-based arbitrations. The ICSID has had a very heavy caseload over the past decade, but in its first few decades of existence very few disputes were brought through the ICSID.⁶⁰ The first cases brought before ICSID tribunals were based on arbitration

⁵⁶ See Zahn, *supra* note 35.

⁵⁷ The *Convention on the Settlement of Investment Disputes Between States & Nationals of Other States (Washington Convention)*. 18 March 1965, 5 ILM 532 (1965).

⁵⁸ The definitive commentary on the *ICSID Convention* is: Christoph Schreuer, et al. (2009). *The ICSID Convention: A Commentary, Second Edition*. Cambridge, CUP.

⁵⁹ See *UN Convention on the Recognition & Enforcement of Foreign Arbitral Awards (New York Convention)*. 10 June 1958, 330 UNTS 3 (1959); *Inter-American Convention on International Commercial Arbitration (Panama Convention)*. 30 January 1975, 14 ILM 336 (1975).

⁶⁰ In the first 20 years, the total number of registered ICSID cases was 20.

clauses in contracts that prescribed ICSID arbitration.⁶¹ Many of the first cases settled or were discontinued before reaching awards on the merits.⁶² The first merits award rendered by ICSID came in 1977 in *Adriano Gardella v. Côte d'Ivoire*.⁶³ In 1984, the case of *SPP v Egypt*,⁶⁴ marked the beginning of arbitrations based on non-contractual consent (so-called arbitration without privity⁶⁵). However, this case was based on Egypt's foreign investment law and not on a BIT. It was not until 1987, that the first true investment treaty arbitration claim was initiated. This was the case of *Asian Agricultural Products v. Sri Lanka*,⁶⁶ and was based on a BIT signed between Sri Lanka and the United Kingdom (UK) in 1980.

Both before and after the ratification of the *ICSID Convention*, there were a number of concession- or contract-based international arbitrations in the Middle East over the nationalization of petroleum operations. These occurred in Abu Dhabi,⁶⁷ Saudi Arabia,⁶⁸ Qatar,⁶⁹ Kuwait,⁷⁰ Iran,⁷¹ and most famously, Libya.⁷² While none of these arbitrations were treaty-based, their relevance in understanding the development of investment treaty arbitration is profound. These arbitrations stretched from the early 1950s through the early 1980s, and overlapped with both the process of decolonization and the NIEO.

These cases were intertwined with the NIEO, especially the three Libyan arbitrations of the 1970s, because they turned on whether the concessions could be 'internationalized' in the face of nationalization.⁷³ This was a significant issue because a typical commercial arbitration would demand an application of domestic law in the adjudication of the dispute. In these

⁶¹ See e.g. *Alcoa Minerals of Jamaica Inc. v. Jamaica* (ICSID Case No. ARB/74/2). 6 July 1975, Decision on Jurisdiction. This case was eventually settled.

⁶² See e.g. *Holiday Inns & Others v. Morocco* (ICSID Case No. ARB/72/1). 17 October 1978, Settlement; *Reynolds Jamaica Mines Ltd. & Reynolds Metals Co. v. Jamaica* (ICSID Case No. ARB/74/4). 12 October 1977, Discontinued.

⁶³ *Adriano Gardella v. Côte d'Ivoire* (ICSID Case No. ARB/74/1). 29 August 1977, Award. The jurisdiction of this case was based on an ICSID arbitration clause in a contract.

⁶⁴ *Southern Pacific Properties (SPP) (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3). 20 May 1992, Award. The jurisdiction of this case was based on an ICSID dispute settlement provision in the Egyptian Law on Foreign Investment.

⁶⁵ Paulsson, *supra* note 9.

⁶⁶ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3). 27 June 1990, Award. The jurisdiction of this case was based on an ICSID dispute settlement provision in the *Sri Lanka-UK BIT* (1980).

⁶⁷ *Petroleum Development (Trucial Coast) Ltd. v. Sheik of Abu Dhabi* (Ad Hoc Arbitration). 18 ILR 144 (1951).

⁶⁸ *Saudi Arabia v. Arabian American Oil Co.* (Ad Hoc Arbitration). 27 ILR 117 (1958).

⁶⁹ *Ruler of Qatar v. International Marine Oil Co. Ltd.* (Ad Hoc Arbitration). 20 ILR 534 (1953).

⁷⁰ *American Independent Oil Co. (Aminoil) v. Kuwait* (Ad Hoc Arbitration). 21 ILM 976 (1976).

⁷¹ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (Ad Hoc Arbitration). 35 ILR 136 (1963).

⁷² *BP Exploration Co. (Libya) Ltd. v. Libyan Arab Republic* (Ad Hoc Arbitration). 10 October 1973, 53 ILR 297 (1979); *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic* (Ad Hoc Arbitration). 53 ILR 389 (1979); *Libyan American Oil Co. (Liamco) v. Libyan Arab Republic* (Ad Hoc Arbitration). 12 April 1977, 20 ILM 1 (1981).

⁷³ See Soranrajah, *supra* note 2 at pp. 289-304.

arbitrations, however, the application of domestic law would have resulted in the application of an expropriation standard far below the international standard; and further, even if a viable argument for the internationalization of the concession was achieved, the party who had been nationalized would still have significant problems in enforcing such an award against the state where the investment was nationalized. The *ICSID Convention* was primarily aimed at providing a solution to these seemingly intractable issues relating to the nationalization of foreign assets.

During this same period, there was a revolution in Iran that led to a large number of US investors in Iran whose investments became subject to the new governments' orders for nationalizing foreign assets. This led to the signing of the *Algiers Accord*, which set up the US-Iran Claims Tribunal.⁷⁴ This tribunal, which is subject to international law, provides binding arbitration for investments made by US investors during a specific period before the Iranian Revolution. The US-Iran Claims Tribunal permitted US investors to directly file claims against Iran for losses occurred as a direct result of the Iran Revolution of 1979. By permitting investors with direct claims against a sovereign state, the US-Iran Claims Tribunal foreshadowed many of the same issues that would arise in BIT-based investor-state arbitrations in the coming decades, and as such, the jurisprudence of the US-Iran Claims Tribunal has had a significant impact on the development of investment treaty arbitration, especially in regard to expropriation.

3.4 The Fall of the Soviet Union and the Washington Consensus

By the mid-1980s, a number of capital-exporting states were able to identify the potential benefits of treaty-based mechanisms (such as the *Algiers Accord*) for the adjudication of international investment disputes. As such, the US embarked on the development of a BIT program in the early 1980s, and issued a model BIT in 1984.⁷⁵ By the end of the 1980s, the fall of the Soviet Union marked the beginning of a new era of market liberalization, and it was during this time that the signing of BITs exploded.⁷⁶ The chants for a NIEO had largely waned, and capital-importing states that had been active in the development of the NIEO shifted course. For a variety of reasons, some of

⁷⁴ *Iran-US Claims Settlement Declaration (Algiers Accords)*. 19 January 1981.

⁷⁵ See *Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984 (1984 Model BIT)*. Berkeley Journal of International Law. Vol. 4, p. 136 (1986); see also Kenneth Vandevelde (2010). *Bilateral Investment Treaties: History, Policy, Interpretation*. Oxford, OUP; Kenneth Vandevelde (2009). *US International Investment Agreements*. Oxford, OUP.

⁷⁶ The upsurge in the signing of BITs during this period included the US, but a number of other capital-exporting countries also had significant BIT programs in place at this time.

which are still not fully understood (and which should not be assumed to be purely economic), capital-importing states signed BITs at a rapid pace.⁷⁷

The BITs signed during this period, although bilateral in nature, feature a number of similarities. They are fairly brief documents, usually not more than six pages, and many permit dispute settlement provisions allowing for the invocation of investor-state arbitration. They also provide a set of standards on the protection of foreign investment, which create binding obligations on states hosting the investment.⁷⁸ However, it is important to note that the exact wording of these standards ranges considerably from treaty to treaty; and such differences commonly mandate that arbitrators interpret these provisions as they are given in the specific treaty and not as they may be generalized by scholars and commentators. This can, and has, caused significant fragmentation and consistency issues; but it can also be said that BITs signed during this period were intended to remedy many of the problems that capital-exporting countries faced in the post-colonial era. As any breach of the treaty would, by its very nature, be an international dispute, these early BITs provided a robust set of protections that could avoid many of the shortcomings identified in typical ad hoc contract-based commercial arbitration.

By the mid-1990s, a significant number of countries had BIT programs, and were actively engaged in promoting them. Two important plurilateral agreements were also signed during this period. In 1994, the *North American Free Trade Agreement (NAFTA)* entered into force.⁷⁹ This was one of the first FTAs to incorporate BIT-like provisions through the inclusion of an investment chapter as part of the larger trade liberalizations in the agreement.⁸⁰ Further, it was one of the first treaties that would provide treaty-based investment protections between two capital-exporting states (the US and Canada). Around the same time, the *Energy Charter Treaty (ECT)* was also negotiated and entered into force.⁸¹ The *ECT*, like the *NAFTA*, provides, inter alia, for the protection of foreign investors through substantive provisions that can be arbitrated if the state hosting the investment fails to meet its treaty obligations. Unlike the majority of BITs and FTAs that have been signed, however, the *ECT* is sector-specific, and provides protections only for energy-related foreign direct investment.

⁷⁷ An early and influential explanation is Andrew Guzmán (1998). *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*. Virginia Journal of International Law. Vol. 38, p. 639. However, Guzmán's approach has been criticized, inter alia, for attempting to explain BIT signing in game theoretical and rational choice terms exclusively.

⁷⁸ Most commonly, BITs include standards on most-favored nation (MFN) treatment, national treatment, nondiscrimination, expropriation, transfer of funds, full protection and security (FPS), and fair and equitable treatment (FET). Less commonly, BITs include provisions on pre-establishment rights, denial of benefits, preservation of rights, non-precluded measures, access to justice, performance requirements, and pacta sunt servanda (the so-called umbrella clause). See Dolzer & Schreuer, supra note 2.

⁷⁹ The *NAFTA*, supra note 6.

⁸⁰ See Chapter 11 of the *NAFTA*.

⁸¹ The *ECT*, supra note 5.

These developments also coincided with transformational changes in the area of international trade. In 1994, the World Trade Organization (WTO) came into existence.⁸² Unlike the GATT, the WTO provides for a standing international tribunal for the settlement of WTO-related disputes.⁸³ All of this was occurring in the post-Soviet glow of the West, who rightly or wrongly, was strongly supporting a new era of globalization through the implementation of the so-called Washington consensus.⁸⁴

3.5 Antiglobalization and the Backlash

By the end of the 1990s, however, there was significant civil society pushback on what was being termed by many as a new form of economic colonialism whereby the developed countries of the world were imposing policies of liberalization upon the developing world to their detriment. This led to a number of antiglobalization movements that stalled the development of the WTO and also thwarted a late 1990s attempt by the Organization for Economic Cooperation and Development (OECD) to negotiate a multilateral agreement on investment.⁸⁵ Despite these setbacks, both the WTO and BIT legal orders would enter the new millennium intact. While the WTO began to develop a jurisprudence through its dispute settlement mechanism, treaty-based arbitrations based on dispute settlement provisions in BITs and FTAs dramatically increased. There were a number of disputes during this period brought under the investment protections of the *NAFTA*; and as importantly, a large number of arbitrations against Argentina following its economic crisis in 2000 and 2001.

⁸² The *Marrakesh Agreement Establishing the World Trade Organization (WTO)*. 15 April 1994, 1867 UNTS 154 (1994).

⁸³ The *Understanding on Rules & Procedures Governing the Settlement of Disputes (DSU)*. Marrakesh Agreement Establishing the World Trade Organization, Annex 2. 15 April 1994, 33 ILM 1226 (1994).

⁸⁴ The term Washington Consensus was coined by economist John Williamson in 1989 to connote policies pursued by Washington-based institutions, such as the World Bank, in the late 1980s and throughout the 1990s. Some of these policy objectives included recommendations for states to liberalize trade, privatize state enterprises, reduce subsidies, deregulate markets, and provide legal security for property rights.

⁸⁵ *Draft Multilateral Agreement on Investment (Draft MAI)*. 12 February 1998, Organization for Economic Cooperation & Development (OECD), DAF/MAI/NM(98); see also Peter Muchlinski (2000). *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?* Washington, American Bar Association. Additional attempts at multilateralizing international investment law in the late twentieth century include: *Singapore Ministerial Declaration*. 18 December 1996, WT/MIN(96)/DEC. World Trade Organization (WTO) (1996); *World Bank Guidelines on the Treatment of Foreign Direct Investment*. Washington, World Bank, 31 ILM 1379 (1992); *Draft Convention on the Protection of Foreign Property*. Paris, OECD (1967); *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*. Louis Sohn & Richard Baxter. Cambridge, Harvard Law School (1961); *Abs-Shawcross Draft Convention on Investments Abroad*. Herman Abs & Hartley Shawcross (1959). American Journal of International Law. Vol. 55, p. 545.

Throughout the first decade of the new millennium states continued to sign BITs and FTAs at a rapid clip, and the increase in investor-state arbitrations as based on these treaties spawned a large amount of commentary. While most of the discourse during this period was constructive and related to many of the substantive and procedural issues pertaining to this new form of international adjudication, the rapid increase in the use of investor-state arbitration quickly attracted an inordinate number of detractors who proclaimed that investment treaty arbitration was (and continues to be) in the midst of a legitimacy crisis and that this 'backlash' against the practice requires international legal decisionmakers and scholars to reassess whether or not investment treaty arbitration is a form of global legal governance worthy of support.

Alongside this first generation of legitimacy literature, however, the US reevaluated its model BIT in the early 2000s in light of the fact that it had been subject to a significant number of disputes under the *NAFTA* in its first decade of existence.⁸⁶ This resulted in a 2004 model BIT,⁸⁷ and the more recent 2012 model BIT,⁸⁸ that were significantly more detailed than previous models, and provided for a number of concessions away from a highly investor protective model to a more modest one that was cognizant of the need to protect a sovereign states' right to regulate in the public interest (even if such actions negatively affected its foreign investors).⁸⁹ This is a trend that has persisted ever since, and a number of developed countries have endorsed models that give states much more latitude in avoiding liability where investor rights have been negatively affected. While no developed state has renounced any of its prior BITs (although Australia has recently decided to exclude investor-state dispute settlement options in future treaties⁹⁰), a few states in

⁸⁶ See e.g. *Mondev International Ltd. v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/99/2), 11 October 2002, Award; *ADF Group Inc. v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/00/1), 9 January 2003, Award; *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/98/3), 26 June 2003, Award. See also Guillermo Aguilar Alvarez & William Park (2003). *The New Face of Investment Arbitration: NAFTA Chapter 11*. *Yale Journal of International Law*. Vol. 28, p. 365.

⁸⁷ *Treaty Between the Government of the United States of America & the Government of [Country] concerning the Encouragement & Reciprocal Protection of Investment (2004 Model BIT)*. Washington, US Department of State (2004), available at: <http://www.state.gov/documents/organization/117601.pdf> (last accessed 1 September 2013).

⁸⁸ *Treaty Between the Government of the United States of America & the Government of [Country] concerning the Encouragement & Reciprocal Protection of Investment (2012 Model BIT)*. Washington, US Department of State (2012), available at: <http://www.state.gov/documents/organization/188371.pdf> (last accessed 1 September 2013).

⁸⁹ See Kenneth Vandevelde (2009). 'A Comparison of the 2004 and 1984 US Model BITs: Rebalancing Investor and Host Country Interests,' in Karl Sauvant, ed. *The Yearbook on International Investment Law & Policy, 2009-2010*. Oxford, OUP, p. 7.

⁹⁰ *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs & Prosperity*. November 2011, Australian Government, Department of Foreign Affairs & Trade, available at: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf> (last accessed 1 September 2013).

Latin America have recently taken the action of denouncing some of their BITs⁹¹ and exiting from the *ICSID Convention*.⁹²

This general overview of the contemporary investment treaty regime has attempted to show both how the regime has developed, but also how its historical pedigree is rooted in public international law.⁹³ While the public nature of the regime has always been understood by those who have been familiar with this historical narrative, many have criticized investment treaty arbitration as a mode of private adjudication. And while there is good reason for correlating investment treaty arbitration with international commercial arbitration, there are significant differences.

The reality is that investment treaty arbitration is a hybrid of the two, which makes the evaluation of the dispute settlement provisions in BITs and FTAs difficult to categorize through an exclusively public-private dichotomy.⁹⁴ While the procedures of investment treaty arbitration resemble those of international commercial arbitration, the disputes to which arbitrators are called upon to arbitrate are distinctly public in nature. From a regime-design perspective, this hybridization of dispute settlement is both counterintuitive and contradictory to those who believe that the resolution of disputes can only find acceptance if they meet criteria to which they are familiar. Investment treaty arbitration challenges this approach, but that does not mean that it cannot evolve into, or is not already, a fair and legitimate form of international adjudication.

4. THE BACKLASH AGAINST INVESTMENT TREATY ARBITRATION

A vast amount of literature over the past decade has claimed that there is, alternatively, a backlash against investment treaty arbitration or that it is in the midst of a legitimacy crisis.⁹⁵ When describing a crisis, it is usually a

⁹¹ These include Venezuela and Ecuador. However, Argentina is contemplating withdrawal from a number of their BITs as well.

⁹² These include Venezuela (24 January 2012), Ecuador (6 July 2009), and Bolivia (2 May 2007).

⁹³ See Alvarez, *supra* note 2; Stephan Schill, ed. (2010). *International Investment Law and Comparative Public Law*. Oxford, OUP.

⁹⁴ See Alex Mills (2011). *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*. *Journal of International Economic Law*. Vol. 14, pp. 469, 476; Julie Maupin (2012). *Public and Private in International Investment Law: An Integrated Systems Approach*. Duke University School of Law, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144019 (last accessed 1 September 2013); William Park (2005). *Emerging Dilemmas in International Economic Arbitration – Private Disputes and the Public Good: Explaining Arbitration Law*. *American University International Law Review*. Vol. 20, p. 903.

⁹⁵ Devashish Krishan (2011). 'Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was,' in Stephan Schill, ed. *International Investment Law and Comparative Public Law*. Oxford, OUP; Michael Waibel, et al. (2010). *The Backlash against Investment Arbitration*. The Hague, Kluwer; David Caron (2009). *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*. *Suffolk Transnational Law Review*. Vol. 32, p. 513; Noemi Gal-Or (2009). *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in*

phenomenon constrained by a particular event. With investment treaty arbitration, however, the crisis is not identifiable as a single event. Rather, there appear to be multiple legitimacy crises that have come in waves of discursive response to particular decisions or sets of decisions rendered by investment treaty tribunals. As such, these critiques about the legitimacy of the dispute settlement mechanisms found in most BITs and FTA investment chapters have evolved and changed over time as more and more tribunals issue awards.

However, while there are some commentators who believe that the entire regime is so structurally flawed as to call for its dismantlement,⁹⁶ others believe that many of the issues concerning the regime's fairness and legitimacy can be resolved as the regime evolves.⁹⁷ Regardless, it is evident that states have the ability to respond to the perceived inadequacies of investment treaty arbitration through the modification (and occasional denunciation) of the treaties that grant jurisdiction to arbitral tribunals; and there are good signals that states are exercising this power.⁹⁸

It is also evident that arbitrators themselves – rightly or wrongly – can, and are, responding to perceived issues of legitimacy and fairness through their decisions. It appears that many early tribunals viewed BITs primarily as one-

the Legitimacy Debate. Suffolk Transnational Law Review. Vol. 32, p. 271; Jason Webb Yackee (2009). *Toward a Minimalist System of International Investment Law?* Suffolk Transnational Law Review. Vol. 32, p. 303; Charles Brower & Stephan Schill (2009). *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* Chicago Journal of International Law. Vol. 9, p. 471; David Schneiderman (2008). *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge, CUP; Christopher Ryan (2008). *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*. University of Pennsylvania Journal of International Economic Law. Vol. 29, p. 725; Jeswald Salacuse (2007). *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*. Fordham International Law Journal. Vol. 31, p. 138; Ann Capling & Kim Nossal (2006). *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*. Governance. Vol. 19, p. 151; Muthucumaraswamy Sornarajah (2006). *A Law for Need or a Law for Greed? Restoring the Lost Law in the International Law of Foreign Investment*. International Environmental Agreements. Vol. 6, p. 329; Susan Franck (2005). *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*. Fordham Law Review. Vol. 73, p. 1521.

⁹⁶ Tolga Yalkin (2009). *International Investment Arbitration: Poisoned at the Root?* British Institute for International & Comparative Law (BIICL) Annual Conference on Business & Law, available at: <http://ssrn.com/abstract=1438634>; Gus van Harten (2007). *Investment Treaty Arbitration and Public Law*. Oxford, OUP; Schneiderman, *supra* note 95; Webb Yackee, *supra* note 95.

⁹⁷ Andrea Björklund (2009). *The Emerging Civilization of Investment Arbitration*. Penn State Law Review. Vol. 113, p. 1269; Chester Brown & Kate Miles, eds. (2011). *Evolution in Investment Treaty Law and Arbitration*. Cambridge, CUP; Catherine Rogers, ed. (2009). *The Future of Investment Arbitration*. Oxford, OUP; José Alvarez & Karl Sauvant, eds. (2011). *The Evolving International Investment Regime: Expectations, Realities, Options*. Cambridge, CUP; Stephan Schill (2011). *System-Building in Investment Treaty Arbitration and Lawmaking*. German Law Journal. Vol. 12, p. 1083; Stephen Schwebel (2009). *The Overwhelming Merits of Bilateral Investment Treaties*. Suffolk Transnational Law Review. Vol. 32, p. 263.

⁹⁸ See José Alvarez & Gustavo Topalian (2012). *The Paradoxical Argentina Cases*. World Arbitration & Mediation Review. Vol. 6, pp. 491, 494.

way agreements that compelled arbitrators to protect investment to the exclusion of other obligations and defenses that the state may have. This trend appears to be reversing as arbitral tribunals are becoming more sensitive to the public nature of investment treaty arbitration, and are reflecting this shift in providing more deference to state decisionmaking.⁹⁹

What this means for the future of evolving legal orders is that lawshaping and lawinfluencing discourse does indeed matter. Many of the issues originally challenged by critiques of the regime are being addressed, or time has demonstrated that the original fears were unwarranted. When looking at the history of these legitimacy events over the past decade, it is apparent that they are largely a moving target with detractors latching on to new crises as the old ones fade away. This is a good thing. Some issues currently under discussion in investment treaty arbitration will likely be old news in five to ten years. This is an indication that the discourse is not only important, but that it is working. Decisionmakers involved in the development of the investment treaty arbitration regime are responding to the discourse.

4.1 A Summary of the Issues

Before turning to a description and evaluation of the discursive waves relating to legitimacy issues in investment treaty arbitration, it is perhaps useful to distinguish what are the reoccurring themes and what is meant by legitimacy in the context of investment treaty arbitration. Legitimacy, like fairness and justice, is a normative metavalue that defies precise meaning. However, there are a number of ways that the word legitimacy has been used in the literature on investment treaty arbitration. Primarily, legitimacy refers to the authoritativeness of a particular legal order to take action in a particular way. For investment treaty arbitration, a reference to legitimacy has manifest itself as a reference to three major types or categories.

The first use of legitimacy refers to whether or not arbitral tribunals are using their authority in a manner that is acceptable to those affected by their decisions. When that authority is perceived to have been exceeded, it can be seen as illegitimate. The second use of legitimacy refers to the distribution of power among states entering into agreements that allow for investor-state dispute settlement. Any agreement procured along traditional north-south lines, and perceived as an agreement of adhesion, can be viewed as illegitimate.¹⁰⁰ In investment treaty arbitration, this generally means that any BIT between a powerful state and a less powerful state will be perceived as an

⁹⁹ José Alvarez (2011). *The Return of the State*. Minnesota Journal of International Law. Vol. 20, p. 223.

¹⁰⁰ José Alvarez (2009). *A BIT on Custom*. New York University Journal of International Law & Politics. Vol. 42, p. 17.

illegitimate legal instrument. And finally, for investment treaty arbitration, a third use of legitimacy refers to the legal order itself. That is, does it reflect the rule of law? Are decisions of tribunals consistent, coherent, procedurally fair, and reasonable? If they are not able to meet certain criteria, the legal order itself can be said to be illegitimate.

In a recent article,¹⁰¹ José Alvarez and Gustavo Topalian distilled the current legitimacy issues in investment treaty law broadly to include the following six major issues. First, investment treaty arbitral tribunals produce inconsistent decisions over time and that this defeats the primary objective of the regime in producing a stable and predictable legal environment for foreign direct investment. Second, investment treaty arbitration awards are a threat to national sovereignty and that they are insufficiently deferential to national law and the need for sovereign states to be able to regulate in the public interest. Third, investment treaty arbitral tribunals fail to respect the rights of states to take national emergency action in response to a fundamental national security threat. Fourth, investment treaty arbitration awards are skewed in favor of investors and that investment treaty arbitration is essentially a ‘one trick pony’ that protects investment at the expense of all other policy goals. Fifth, investment treaty arbitration falls on the wrong side of the public-private divide and that these arbitral awards erroneously privatize disputes that should only be heard in public forums. And sixth, investment treaty arbitration awards are a species of global administrative law that fails to reflect the rule of law values found in national administrative and constitutional law. He goes on to say that all of these six legitimacy critiques can be reduced to an underlying singularity: “the investment regime is the enemy of the state.”¹⁰²

Even if all of these critiques can be taken *prima facie* as true (which Alvarez emphatically disputes), where did they come from and how have these issues evolved over time? Prior to the year 2000, investment treaty arbitrations attracted little scrutiny. There had only been a handful of decisions rendered up to that point and there were few in the international legal community who had specialized knowledge in this emerging field of practice.

Perhaps ironically however, the initial contemporary legitimacy crisis in international investment law had very little to do with investment treaty arbitration itself. The key event can be traced to the establishment of the WTO in 1994. This is because the antiglobalization movement that was aimed at dismantling the global trade regime had spillover effects on an attempt by the OECD to negotiate a *Draft Multilateral Agreement on Investment (Draft MAI)* in 1998.¹⁰³ The timing by the OECD could not have been worse, and even if the

¹⁰¹ Alvarez & Topalian, *supra* note 98 at p. 491-92.

¹⁰² *Id.*

¹⁰³ *Draft MAI*, *supra* note 85.

timing had been better, the OECD – as an organization of the most developed states in the world – was the wrong institution to pursue such an agreement. Predictably, the *Draft MAI* negotiations failed when advocacy groups claiming to represent the interests of developing countries intervened in the process.¹⁰⁴ These groups held that the de jure multilateralization of international investment law would parallel the negative predictions being made about the further multilateralization of international trade law. False prophecies aside, the failed negotiations of the *Draft MAI* can be seen as the starting point for successive legitimacy crises claimed against investment treaty arbitration up to the present.

4.2 The First Wave

In the early to mid-2000s, there were a number of investor-state arbitrations that generated the first wave of legitimacy crisis literature. Up until this point, there were only a small number of investment treaty awards that had been rendered; and the cases, while interesting to particular specialists in international dispute settlement, attracted limited attention by legal academics and were completely absent from the public discourse at large. This all changed in the early 2000s with a number of cases that included, inter alia, the early *NAFTA* cases – especially the Loewen case, the two SGS cases, and the Lauder-CME cases.

4.2.1 The Loewen Case and the Perceived Threat to Sovereignty

It is believed that the negotiation of the *NAFTA* investment chapter was primarily geared towards protecting investments in Mexico, and while claims against Mexico by US and Canadian investors have occurred, it is the claims by US investors against Canada and Canadian investors against the US that has had the largest direct impact on the development of investment treaty arbitration. While there are now a few cases in Europe where investors from developed countries are initiating claims against other developed states,¹⁰⁵ the Canada-US and US-Canada disputes were the first of their kind for investment treaty arbitration. These disputes alerted both the US and Canada to the fact that IIAs actually flow both ways. While the reciprocal nature of BITs and FTA investment chapters is clearly spelled out in the treaties, few developed states every thought that they would have to be defending claims.

¹⁰⁴ See Muchlinski, *supra* note 85.

¹⁰⁵ See *Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain*, ECT (SCC Arbitration). Case Filed 1 May 2013; *Vattenfall & Others (Sweden) v. Federal Republic of Germany*, ECT (ICSID Case No. ARB/12/12). Case Filed 31 May 2012; *PV Investors v. Spain*, ECT (UNCITRAL Ad Hoc Arbitration). Case Filed 1 November 2011; *Philip Morris Asia Ltd. v. The Commonwealth of Australia* (PCA Case No. 2012-12). Case Filed 22 June 2011.

*Loewen v. United States*¹⁰⁶ was a claim for denial of justice¹⁰⁷ brought by a Canadian investor against the US. Although the claimant, Loewen, did not prevail on his claim for denial of justice, this case represents a line of cases where Canadian investors have filed suit against the US.¹⁰⁸ The Loewen case did not involve a claim against the US that was readily cognizable to commercial arbitrators and lawyers. Rather, the case claimed that a Mississippi court had denied justice (as a rule of customary international law reflected in Article 1105 of the *NAFTA*) to a Canadian investor in US judicial proceedings.¹⁰⁹ It was a claim that the justice system of the US had embarrassing shortcomings, and that these shortcomings could be remedied under international law.¹¹⁰ When this *NAFTA* claim reached a level of consciousness among lawmakers in Washington, few could understand how such a 'secret tribunal'¹¹¹ could ever have been constituted in the first place. Even Bill Moyers entered the fray, claiming that the *NAFTA* tribunal was undermining fundamental processes of democratic rule.¹¹² It is claimed that these early *NAFTA* cases against the US (the US has still not lost a claim under the *NAFTA*) shifted US policy towards its BIT program.¹¹³

¹⁰⁶ *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/98/3). 5 January 2001, Decision on Jurisdiction; *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/98/3). 26 June 2003, Award.

¹⁰⁷ See generally Jan Paulsson (2005). *Denial of Justice in International Law*. Cambridge, CUP.

¹⁰⁸ See *Mondev International Ltd. v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/99/2). 11 October 2002, Award; *ADF Group Inc. v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/00/1). 9 January 2003, Award; *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, *NAFTA* (ICSID Case No. ARB(AF)/98/3). 26 June 2003, Award; *Methanex Corp. v. United States of America*, *NAFTA* (UNCITRAL Ad Hoc Arbitration). 2 September 2005, Award; *Softwood Lumber Consolidated Proceedings v. United States of America*, *NAFTA* (UNCITRAL Ad Hoc Arbitration). 6 June 2006, Decision on Preliminary Questions; *Grand River Enterprises Six Nations Ltd. v. United States of America*, *NAFTA* (UNCITRAL Ad Hoc Arbitration). 20 July 2006, Decision on Jurisdiction; *Canadian Cattlemen for Fair Trade v. United States of America*, *NAFTA* (UNCITRAL Ad Hoc Arbitration). 28 January 2008, Decision on Jurisdiction; *Glamis Gold v. United States of America*, *NAFTA* (UNCITRAL Ad Hoc Arbitration). 8 June 2009, Award.

¹⁰⁹ Andrea Björklund (2005). *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*. *Virginia Journal of International Law*, Vol. 45, p. 809.

¹¹⁰ See Noah Rubins (2005). *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*. *Arbitration International*. Vol. 21, p. 1; William Dodge (2002). *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*. *DePaul Law Review*. Vol. 52, p. 563.

¹¹¹ Anthony DePalma (2001). *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*. *New York Times*, 11 March.

¹¹² Bill Moyers (2004). *Trading Democracy*. Films for the Humanities and Sciences. Princeton, Video Recording.

¹¹³ In 2004, the US issued a new model BIT that included significant changes, which introduced more sovereign protective standards than earlier US model BITs.

4.2.2 The SGS Cases and the Problems of Precedent and Consistency

The SGS cases were not quite as politically dramatic as that of the Loewen case, but were nonetheless important to early claims that investment treaty arbitration was not going to work as a system of adjudication. The SGS cases comprised of two tribunals, *SGS v. Pakistan*¹¹⁴ and *SGS v. Philippines*,¹¹⁵ that came to different interpretations of the umbrella clauses in the relevant BITs. Generally speaking, umbrella clauses internationalize the principle of *pacta sunt servanda* in regard to specific obligations that a state may make with private entities.¹¹⁶ In other words, an umbrella clause in a treaty has the potential to elevate a contract breach into a treaty breach. In both cases, the umbrella clause and the underlying contract breach were very similar and yet the tribunals understood the resulting obligations of the state as distinct.¹¹⁷

Essentially, the Pakistan tribunal held that the umbrella clause in the BIT is to be read restrictively as to preclude almost any instance where it would be applicable. The Philippines tribunal, on the other hand, held that the umbrella clause in the BIT must be given full meaning and that such a clause is intended to include obligations on the state. While the Philippines tribunal found that a forum selection clause in the contract would prevent the application in that particular instance, these two cases were among the first to highlight the possibility that two tribunals evaluating similar treaty provisions over similar factual claims could come to diametrically opposed interpretations.¹¹⁸

These two cases also highlighted an issue that remains active in investment treaty arbitration through the present: the issue of precedent and obiter dicta. From its very inception, and building on the format of awards issued by claims commissions and the US-Iran Claims Tribunal, investment treaty arbitration awards have never reflected international commercial arbitration awards. Rather, investment tribunals go to great lengths to explain why they have decided in the way that they have and where their decision fits into the jurisprudence of prior awards. While it is arguable that this approach results

¹¹⁴ *Société Générale de Surveillance (SGS) v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13). 6 August 2003, Decision on Objections to Jurisdiction.

¹¹⁵ *Société Générale de Surveillance (SGS) v. Republic of the Philippines* (ICSID Case No. ARB/02/6). 29 January 2004, Decision on Objections to Jurisdiction.

¹¹⁶ Christoph Schreuer (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses, and Forks in the Road*. *Journal of World Investment & Trade*. Vol. 5, p. 2; Andrew Sinclair (2004). *The Origins of the Umbrella Clause in the International Law of Investment Protection*. *Arbitration International*. Vol. 20, p. 411; Thomas Wälde (2005). *The 'Umbrella Clause' in Investment Arbitration: A Comment on Original Intentions and Recent Cases*. *Journal of World Investment & Trade*. Vol. 6, p. 183.

¹¹⁷ Kathryn Ballentine (2006). *How Far Do Bits Bite – A Comparison of SGS v. Pakistan and SGS v. Philippines: Interpreting Umbrella Clauses in Bilateral Investment Treaties*. *Cambridge Student Law Review*. Vol. 2, p. 33.

¹¹⁸ Jarrod Wong (2006). *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*. *George Mason Law Review*. Vol. 14, pp. 135, 137.

from investment tribunal arbitrators' viewing their decisions as part of the development of international law, it can also cause problems.

The *SGS v. Philippines* decision on jurisdiction, for example, did not have to rule on the scope of umbrella clauses in order to render its decision. Yet, it did; creating a self-imposed interpretive controversy in the process. In many ways this is not wholly problematic, and it is something that public tribunals – both domestic and international – frequently engage in. More problematic is the claim that tribunals are not, or should not be, engaging in this type of activity because investment tribunals are ad hoc in nature and do not have a formal mechanism appellate review or the application of precedent.

The hybrid structure of investment treaty tribunals creates a difficult predicament: on the one hand, arbitrators will be criticized if their awards are unreasoned and brief; and on the other hand, arbitrators will be criticized if their awards are excessive long, full of obiter dicta, and permissive of dissents. While this tension about the role of arbitrators as public or private adjudicators was identified very early in the discourse, attempts at finding the proper balance continues challenge arbitrators in investment treaty disputes through the present.

To that end, a very recent arbitral award highlights this tension on the role of investment arbitration adjudicators that emerged very early in the discourse.¹¹⁹ In the event, three of the most eminent and prolific arbitrators in this field of law demonstrated how there continues to be a debate about how arbitral awards ought to be interpreted. This discourse relates to how prior awards can be considered in present cases, but is also about how arbitrators feel about their duty to produce a consistent jurisprudence over time: a jurisprudence constante. The tribunal was composed of Gabrielle Kaufmann-Kohler, Brigitte Stern, and Francisco Vicuña. In their decision on liability, they held the following:

[t]he Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority [Kaufmann-Kohler and Vicuña] considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her

¹¹⁹ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/05). 14 December 2012, Decision on Liability.

duty to decide each case on its own merits, independently of any apparent jurisprudential trend.¹²⁰

Both views are correct, and yet, they represent perspectives that could wholly affect the outcome of cases.¹²¹ The correct view, it is posited in the context of this work, is the subjective perspective that reflects the proper distribution of value as endorsed by the community of users using this legal order.

4.2.3 The Lauder Cases and the Problem of Multiple Proceedings

Like the SGS cases, the Lauder cases (*Lauder v. Czech Republic*¹²² and *CME v. Czech Republic*¹²³) attracted considerable criticism of the early jurisprudence developing in investment treaty arbitration. In these cases, two awards were issued on essentially the same subject matter in which the tribunals came to very different conclusions. CME, a company incorporated in the Netherlands brought a claim against the Czech Republic under the *Czech Republic-Netherlands BIT*, and the tribunal found in favor of CME. Lauder, on the other hand, was a shareholder in CME and a US national. He brought a claim against the Czech Republic under the *Czech Republic-US BIT*, and the tribunal found in favor of the Czech Republic by denying all claims against it. The subject-matter of the claims were essentially the same.

These two cases brought a number of novel issues to the discourse that continues to hold relevance for the development of investment treaty arbitration. First, like the SGS cases, the Lauder cases identified the potential problems that could arise from the largely bilateral nature of investment treaties. That is, it became apparent that similar claims brought under different BITs could potentially reach very diverse conclusions. Second, it solidified the issue of whether a private model of adjudication – such as international commercial arbitration and its ad hoc, one-off nature – could ever provide consistency and stability across decisions.¹²⁴ While the ad hoc nature of international commercial arbitration is suitable for contractual disputes among private parties, the investment arbitration community began to question whether this private model was appropriate for the types of

¹²⁰ Id. at p. 69.

¹²¹ For a discussion of this debate, see Michael Reisman (2013). ‘Case Specific Mandates’ Versus ‘Systemic Implications’: How Should Investment Tribunals Decide? – The Freshfields Arbitration Lecture. *Arbitration International* Vol. 29, p. 131.

¹²² *Lauder (US) v. Czech Republic* (UNCITRAL Ad Hoc Arbitration). 3 September 2001, Award.

¹²³ *CME Czech Republic (Netherlands) v. Czech Republic* (UNCITRAL Ad Hoc Arbitration). 14 March 2003, Award.

¹²⁴ Andrea Björklund (2007). *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*. *Hastings Law Journal*. Vol. 59, p. 241.

disputes being arbitrated under BITs and FTA investment chapters.¹²⁵ Third, the Lauder cases brought the issue of *res judicata* and parallel proceedings to the fore. Could investment treaty arbitrations potentially lead to multiple claimants bringing multiple disputes under multiple treaties that resulted in multiple levels of compensation for the same claim? So far, the answer is no; but the possibility persists.

While these cases are no longer featured prominently in the new literature on the backlash against investment treaty arbitration, the underlying issues that they identified still exist.¹²⁶ During this initial period, one begins to see a discourse developing on how the multitude of BITs and their calls for dispute settlement procedures modeled on commercial arbitration practices could produce consistent decisions across time.¹²⁷ While the issue of a multilateral investment treaty is not prominently discussed, a discourse on whether investment treaty arbitrations should be subject to some kind of appellate mechanism emerges at the end of this period.¹²⁸

In contraposition to the Loewen case, which was perceived as a threat to US sovereignty, the mid-2000s also saw a number of cases awarding significant damages to investors. Some commentators began to claim that the public administrative nature of the disputes being arbitrated (by having to rule on the consistency of regulatory measures with international rules embodied in BITs) resulted in overly one-sided decisions tilted towards investor protection at the expense of the state's ability to regulate in the public interest.¹²⁹ While such a claim about regulatory autonomy was not at issue in Loewen, it parallels an underlying fear that was developing and would progress throughout the decade: investment treaty arbitration is unbalanced and needs to be readjusted towards a more discretionary model of sovereign authority given that the disputes being adjudicated could have an impact far beyond the facts of a particular dispute.

¹²⁵ Susan Franck (2005). *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?* UC Davis Journal of International Law & Policy. Vol. 12, pp. 47, 63-66.

¹²⁶ See e.g. Stephan Schill (2011). *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*. Virginia Journal of International Law. Vol. 52, p. 57; Irene Cate (2013). *The Costs of Consistency: Precedent in Investment Treaty Arbitration*. Columbia Journal of Transnational Law. Vol. 51, p. 418.

¹²⁷ Björklund, *supra* note 124.

¹²⁸ See David Gantz (2006). *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*. Vanderbilt Journal of Transnational Law. Vol. 39, p. 39.

¹²⁹ Park, *supra* note 94; Franck, *supra* note 95; van Harten, *supra* note 96; Gus van Harten (2005). *Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law*. Arbitration International. Vol. 21 p. 493; Olivia Chung (2007). *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*. Virginia Journal of International Law. Vol. 47, p. 953.

4.3 The Second Wave

The second wave of legitimacy crises discourse came in the mid- to late-2000s. Whereas the first wave of legitimacy discourse was tied to early jurisprudence in the context of the *NAFTA*, the second wave was dominated by the awards rendered as a result of the Argentinian economic crisis of 2000-2001. It is difficult to lump all of these awards together, as they were not all connected to the measures taken by Argentina in response to its economic crisis (in fact, Argentina continues to generate new claims against it¹³⁰); but there were a number of cases resulting in awards on the merits that came early in the second wave and produced a large amount of commentary.¹³¹

4.3.1 The Argentinian Economic Crisis

The most controversial of the Argentina disputes arose out of the emergency measures taken in the wake of a major downturn in its economy.¹³² These measures had a detrimental effect on major foreign investment projects in the gas, electricity, and water sectors. All of the investment treaty disputes that arose from this crisis came from Europe or the US; and the most commonly invoked treaty was the *US-Argentina BIT*.¹³³ As many of the cases arose out of

¹³⁰ See prominently *Repsol & Repsol Butano v. Argentine Republic* (ICSID Case No. ARB/12/38). Case Filed 18 December 2012.

¹³¹ See e.g. Alvarez & Topalian, *supra* note 98; see also José Alvarez & Kathryn Khamsi (2009). 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime,' in Karl Sauvant, ed. *The Yearbook on International Investment Law & Policy, 2008-2009*. Oxford, OUP, p. 10; William Burke-White & Andreas von Staden (2008). *Investment Protection In Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*. Virginia Journal of International Law. Vol. 48, p. 307; Diane Desierto (2010). *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*. University of Pennsylvania Journal of International Law. Vol. 31, p. 827.

¹³² These are the cases that issued awards on the merits and were related to measures taken by Argentina as a result of its economic crisis of 2000-2001: *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8). 12 May 2005, Award; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12). 14 July 2006, Award; *Enron Corp. & Ponderosa Assets v. Argentine Republic* (ICSID Case No. ARB/01/3). 22 May 2007, Award; *LG&E Energy Corp. v. Argentine Republic* (ICSID Case No. ARB/02/1). 25 July 2007, Award; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16). 28 September 2007, Award; *BG Group v. Argentine Republic* (UNCITRAL Ad Hoc Arbitration). 24 December 2007, Award; *Siemens v. Argentine Republic* (ICSID Case No. ARB/02/8). 17 January 2008, Award; *Metalpar v. Argentine Republic* (ICSID Case No. ARB/03/5). 6 June 2008, Award; *Continental Casualty Co. v. Argentine Republic* (ICSID Case No. ARB/03/09). 5 September 2008, Award; *National Grid v. Argentine Republic* (UNCITRAL Ad Hoc Arbitration). 3 November 2008, Award; *Wintershall v. Argentine Republic* (ICSID Case No. ARB/04/14). 8 December 2008, Award; *Suez, Sociedad General de Aguas de Barcelona, & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/03/19). 30 July 2010, Decision on Liability; *Total v. Argentine Republic* (ICSID Case No. ARB/04/01). 27 December 2010, Decision on Liability; *Impregilo v. Argentine Republic* (ICSID Case No. ARB/07/17). 21 June 2011, Award; *El Paso Energy International Co. v. Argentine Republic* (ICSID Case No. ARB/03/15). 11 October 2011, Award.

¹³³ Alvarez & Topalian, *supra* note 98 at p. 499.

a similar set of events, and were based on the same treaty, it was thought that the tribunal decisions would be fairly consistent even though they were constituted independently. And for the most part they did.¹³⁴ However, the original cases (not the annulment committees) generally found that Argentina had not been able to show that their customary defense of necessity precluded wrongfulness.¹³⁵

Although the customary defense of necessity arguably would have only precluded the wrongfulness of Argentina's acts under the international law of state responsibility and would not have allowed Argentina to avoid paying damages,¹³⁶ the early decisions exacerbated the claims that a state should be allowed to protect a vital national interest (such as their economy) during a time of crisis even if this meant disadvantaging foreign investors. Argentina has sought to have some of these awards annulled under the ICSID's internal procedures for annulment, and the results of these annulment decisions have spawned a new legitimacy crisis for investment treaty arbitration that will be discussed in the next section.

4.3.2 A Pro-Investor Bias?

While the commentary on the Argentinian decisions largely focused on the customary defense of necessity and how that defense operates in the context of international investment law, it also provided evidence for a debate that had been percolating: the perception that investment treaty arbitration favors investor and that the awards reflect this bias.¹³⁷ As many of the investment tribunals in the Argentinian cases rejected Argentina's pleas for precluded

¹³⁴ There have been approximately 45 cases brought against Argentina. Some were brought before the economic crisis, and a few were brought after the economic crisis. Of these 45 cases, 33 have rendered decisions on jurisdiction and 17 have issued awards on the merits. There have been an additional seven requests for annulment. See *id.* at pp. 496-97.

¹³⁵ For the customary defense of necessity, see Article 25, *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*. November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.unhcr.org/refworld/docid/3ddb8f804.html> (last accessed 1 September 2013).

¹³⁶ *Id.* at Article 27.

¹³⁷ "Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law." *Public Statement on the International Investment Regime*. 31 August 2010, available at: <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%20201129.pdf> (last accessed 1 September 2013).

liability on the basis of economic necessity, these cases came to be identified with the argument that investment tribunals disproportionately favor investor claims to the detriment of legitimate state policy goals. By the mid-2000s, critiques of the regime focused not only on the procedure of investment treaty tribunals and its tendency to privatize public disputes through the practices of commercial arbitration, but they also began to focus on the claim that investment treaty tribunals only placed obligations on states, not investors; and that this kind of one-sided structure could only result in claims that would vindicate investors in the majority of cases.

These critiques also came at the same time that there was a large upsurge in the number of awards being rendered, and this fact produced a large academic literature relating directly to the body of jurisprudence that was developing, both substantively and procedural. In addition to the issues about the procedures of investment treaty arbitration and whether it should reflect private or public models of adjudication, a literature on the substantive scope of standards of protections in BITs also grew during this period (especially relating to the fair and equitable treatment standard and the standard on compensation for expropriation).¹³⁸

4.3.3 The Backlash Against the Backlash

What also came to prominence during this period is what could be described as the backlash against the backlash. Prominent experts in the field of investment treaty arbitration, both scholars and practitioners, put forth arguments as to why the criticisms of investment treaty arbitration were largely unwarranted. In response to the problem of bilateralism, scholars such as Stephen Schill argued that the proliferation of BITs and the growing jurisprudence from investor-state arbitrations constituted a *de facto* multilateralization of international investment law; and that tribunals were in fact coming to more or less coherent decisions.¹³⁹ Under such a theory, a jurisprudence *constante* was emerging, and that investment treaty tribunals

¹³⁸ See e.g. Reisman & Sloane, *supra* note 28; see also Ioana Tudor (2008). *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. Oxford, OUP; J Pleberack (2008). *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?* *Journal of World Investment & Trade*. Vol. 9, p. 4; L Yves Fortier & Stephen Drymer (2005). *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor?* *ICSID Review*. Vol. 19, p. 293; Mark Kantor (2006). *Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation*. *The Law & Practice of International Courts & Tribunals*. Vol. 5, p. 231; Andrea Björklund (2009). *Causation, Morality, and Quantum*. *Suffolk Transnational Law Review*. Vol. 32, p. 435; Sergey Ripinsky (2009). *Assessing Damages in Investment Disputes: Practice in Search of Perfect*. *Journal of World Investment & Trade*. Vol. 10, p. 1; Thomas Wälde & Borzu Sabahi (2007). *Compensation, Damages, and Valuation in International Investment Law*. *Transnational Dispute Management*. Vol. 4.

¹³⁹ Stephan Schill (2009). *The Multilateralization of International Investment Law*. Cambridge, CUP.

were relying on the past decisions of other tribunals in rendering their awards.¹⁴⁰ In many ways, this meant that arbitrators were not adhering in practice to a purely commercial arbitration model of rendering awards. That is, unlike commercial arbitration, most investment tribunal awards (especially those constituted under the ICSID) were available to the public, they gave expansive reasons for their decisions, and they paid sufficient notice to other decisions made by investment treaty arbitrators.

Eminent international lawyers, such as Stephen Schwebel, have taken this multilateralization argument one step further by claiming that the universe of BITs and FTA investment chapters have come to reflect the customary international law on foreign investment.¹⁴¹ Likewise, scholars such as Susan Franck developed studies empirically demonstrating that investment treaty arbitrations did not reflect the pro-investor bias in reality, and that the outcomes of investment treaty arbitrations were in fact more favorable to state parties than previously assumed.¹⁴²

4.3.4 Human Rights and the Environment

Against this backdrop, and opposing the arguments made in favor of the investment regime, a number of civil society groups and scholars latched onto the idea that investment treaty arbitration was not only a bad idea for developing states¹⁴³ in regard to their sovereignty,¹⁴⁴ it was a bad idea in regard to other areas of international law as well – especially in terms of human rights¹⁴⁵ and environmental¹⁴⁶ obligations. They argued that the

¹⁴⁰ Andrea Björklund (2008). 'Investment Treaty Arbitral Decisions as Jurisprudence Constante,' in Colin Picker, et al., eds. *International Economic Law: The State and Future of the Discipline*. Oxford, Hart Publishing, p. 265.

¹⁴¹ Schwebel, *supra* note 95; Stephen Schwebel (2009). *A BIT About ICSID*. ICSID Review, Vol. 23, p. 1; Stephen Schwebel (2004). *The Influence of Bilateral Investment Treaties on Customary International Law*. American Journal of International Law. Vol. 98, p. 27.

¹⁴² Susan Franck (2011). *The ICSID Effect? Considering Potential Variations in Arbitration Awards*. Virginia Journal of International Law. Vol. 51, pp. 825, 848; Susan Franck (2009) *Development and Outcomes of Investment Treaty Arbitration*. Harvard International Law Journal. Vol. 50, p. 435; Susan Franck (2007). *Empirically Evaluating Claims About Investment Treaty Arbitration*. North Carolina Law Review. Vol. 80, p. 1.

¹⁴³ Jan Wouters, et al. (2009). *The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries*. Human Rights & International Legal Discourse. Vol. 3, p. 263.

¹⁴⁴ Foster, *supra* note 13; William Park & Alexander Yanos (2006). *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*. Hastings Law Journal. Vol. 58, p. 251; Kate Supnik (2009). *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*. Duke Law Journal. Vol. 59, pp. 343.

¹⁴⁵ Jan Wouters & Nicolas Hachez (2009). *When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured*. Human Rights & International Legal Discourse. Vol. 3, p. 301; Pierre-Marie Dupuy, ed. (2009). *Human Rights in International Investment Law and Arbitration*. Oxford, OUP; Ernst-Ulrich Petersmann (2008). *Human Rights, International Economic Law, and Constitutional Justice*. European Journal of International Law. Vol. 19, p. 769; Todd Weiler (2004). *Balancing Human Rights and Investor*

fulfillment of obligations under BITs and FTA investment chapters would prevent states from fulfilling their other obligations under international law and domestic law;¹⁴⁷ especially in the fields of public health law,¹⁴⁸ environmental law, climate change law, and human rights law. These critics also argue that BITs only place obligations on states, and that if investors are given rights under BITs, they should also have obligations. This issue has led to discussions about the possibility of states bringing counterclaims against investors for violations of international human rights and environmental obligations.¹⁴⁹ However, the language of most BITs – as they are currently framed – would not provide grounds for such actions; and therefore, any reforms in this regard will require changes to the language of future BITs.

While the issue of investor obligations has not made much headway, a number of reformers have convinced tribunals that, given the public nature of the disputes, they should be able to submit *amicus curiae* briefs. These briefs have been filed almost exclusively in support of the state respondent in investment treaty cases. Commonly, they ask the tribunal to consider the public interests of citizens in developing states that could be negatively impacted by the claims being made against that state.¹⁵⁰ While no tribunals have allowed third parties to formally enjoin the proceedings, *amicus curiae* submissions are now a common feature in many investment treaty arbitrations. During this period, non-governmental organizations (NGOs) such

Protection: A New Approach for a Different Legal Order. Boston College International & Comparative Law Review. Vol. 27, p. 429; Luke Eric Peterson (2009). *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration*. Montreal, International Centre for Human Rights & Democratic Development.

¹⁴⁶ Jorge Viñuales (2012). *Foreign Investment and the Environment in International Law*. Cambridge, CUP; Markus Gehring, et al., eds. (2010). *Sustainable Development in World Investment Law*. The Hague, Kluwer; Vivian Wang (2007). *Investor Protection or Environmental Protection? 'Green' Development Under CAFTA*. Columbia Journal of Environmental Law. Vol. 32, p. 251; Andrew Newcombe (2005). *Sustainable Development and Investment Treaty Law*. Journal of World Investment & Trade. Vol. 8, p. 3.

¹⁴⁷ This has been debate in the context of contractual stabilization clauses for a significant period of time. In the context of the investment protection, the claim is that international obligations (such as those found in BITs) will create a 'regulatory chill,' thus preventing states from regulating in the public interest because of fear that investment obligations might be breached. See generally Cameron, *supra* note 2; Lorenzo Cotula (2011). *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law*. London, Routledge.

¹⁴⁸ See e.g. the various litigations regarding plain packaging of tobacco products. *Philip Morris Asia Ltd. v. The Commonwealth of Australia* (PCA Case No. 2012-12). Case Filed 22 June 2011; *Philip Morris Brands v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7). Case Filed 19 February 2010.

¹⁴⁹ Yaraslau Kryvoi (2012). *Counterclaims in Investor-State Arbitration*. Minnesota Journal of International Law. Vol. 21, p. 216.

¹⁵⁰ Eugenia Levine (2011). *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*. Berkeley Journal of International Law. Vol. 29, p. 200; Tomoko Ishikawa (2010). *Third Party Participation in Investment Treaty Arbitration*. International & Comparative Law Quarterly. Vol. 59, p. 373; Iain Maxwell (2007). *Transparency in Investment Arbitration: Are Amici Curiae the Solution?* Asian International Arbitration Journal. Vol. 3, p. 176.

as the International Institute for Sustainable Development (IISD)¹⁵¹ also entered the discourse on the reform of standards of protection in investment treaties by calling for stronger balancing in favor of sustainable development objectives.¹⁵²

This emerging focus on sustainable development can be seen as developing from two problems in international law generally: the increasing fragmentation of international law and the proliferation of international tribunals on the one hand, and the difficulty international law faces in regard to the enforcement of environmental law and the law on business and human rights.¹⁵³ For investment treaty arbitration, the fragmentation discourse calls on arbitrators to look for ways that the interpretation of investment treaties can systemically integrate and harmonize other areas of international law when rendering decisions in investment disputes. The problem with this argument in general is that such an integration would compel investment treaty arbitrators to become general courts of international law. A bit ironically perhaps, investment law reformers are asking tribunals to restrict their interpretations over treaty provisions that they actually have jurisdiction over, while at the same time expanding their jurisdiction over other areas of international law that arguably fall outside the jurisdictional mandate of BITs and FTA investment chapters.

4.3.5 A Democratic Deficit?

Amidst the calls for a more deferential role in favor of state sovereignty were a number of academic works seeking to highlight how a private system of adjudication for public disputes would lead (or indeed had already led) to a democratic deficit.¹⁵⁴ The essential claim is that by delegating the adjudication of BIT-based disputes (and the vague, imprecise standards embodied in these treaties) to a tribunal of unelected private adjudicators unaccountable to any structural or institutional oversight is a violation of a core tenet of a democratic rule of law. These scholars hold that investment treaties are

¹⁵¹ See *International Institute for Sustainable Development (IISD)* website, available at: www.iisd.org (last accessed 1 September 2013).

¹⁵² *IISD Model International Agreement on Investment for Sustainable Development*. April 2005, IISD, available at: www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (last accessed 1 September 2013).

¹⁵³ Alvarez (taken from Joel Trachtman) has amusingly called this phenomenon ‘penance envy.’ José Alvarez (2002). *The New Treaty Makers*. British Columbia International & Comparative Law Review. Vol. 25, pp. 213, 226.

¹⁵⁴ See Schneiderman, *supra* note 95; Barnali Choudhury (2009). *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*. Alberta Law Review, Vol. 46, p. 983; Graham Mayeda (2009). *Investing in Development: The Role of Democracy and Accountability in International Investment Law*. Alberta Law Review. Vol. 46, p. 1009 (2009); Barnali Choudhury (2008). *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?* Vanderbilt Journal of Transnational Law. Vol. 41, p. 775.

actually a form of constitutional law that requires adjudicators to decide cases in a manner comparable to domestic constitutional law. And because of this, any form of ad hoc arbitration with party-appointed arbitrators is ill suited for the types of disputes they are asked to decide upon.¹⁵⁵ Instead, it is important for adjudicators to hold permanent positions and to sit before a permanent court that can develop a cohesive line of jurisprudence on the rights and obligations found in investment treaties.¹⁵⁶ They further hold that even if investment treaties are not analogous to national constitutions, they are certainly a form of administrative law.¹⁵⁷

4.4 The Third Wave

For investment treaty arbitration specifically, and as described in the previous section, the second wave of literature on investment treaty arbitration identified many of the main issues that continue to challenge investment treaty arbitration through to the present. However, a third wave of discourse over the past two or three years is identifiable by: 1) new shifts in state policy towards investment treaties, and the impact that such a shift will have on the arbitration of investor-state disputes, 2) an increasing sophistication and specialization of the practitioners and scholars with expertise in this area of international law, and 3) the continued proliferation of decisions available for legal analysis.

4.4.1 The Return of the State

By the end of the first decade of the new millennium, the discourse and practice of investment treaty arbitration had produced a number of shifts in sovereign state policy towards the regime, and this trend continues to manifest itself through the present. There are indicators that some states are dissatisfied with their BIT policies, and states are proving that they indeed have the power to influence the treaties that they sign by using their exit and voice options, or by renegotiating treaties with perceived deficiencies.¹⁵⁸ One of

¹⁵⁵ van Harten, *supra* note 97.

¹⁵⁶ *Id.*

¹⁵⁷ This argument holds that investment treaties ask arbitrators to make determinations on the reasonableness of national policy decisions, laws, and regulations. Therefore, the tribunals themselves should be held to a standard of public participation, transparency, and due process equivalent to national administrative tribunals if they are to be considered legitimate. See *id.*; see also Benedict Kingsbury & Stephan Schill (2009). 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law,' in Albert van den Berg, ed. *Fifty Years of the New York Convention*. The Hague, Kluwer; Gus van Harten & Martin Loughlin (2006). *Investment Treaty Arbitration as a Species of Global Administrative Law*. European Journal of International Law. Vol. 17, p. 121.

¹⁵⁸ Alvarez, *supra* note 99.

the major trends being evidenced is that some traditionally capital-exporting states are increasingly becoming the recipients of foreign direct investment, and likewise, a number of traditionally capital-importing states, especially the so-called BRICs (Brazil, Russia, India, and China) are becoming capital-exporters.

In many ways, these shifts in the overall political economy of states are impacting the way that states approach their BIT and FTA programs. Notably, the US, Australia,¹⁵⁹ and Canada have shifted their BIT and FTA policy towards the inclusion of more sovereign protective provisions in future agreements.¹⁶⁰ China, on the other hand, and possibly reflecting its emerging status as a capital-exporting state, is becoming more open to the inclusion of stronger investment protections in its BITs as Chinese investors increasingly enter global markets.¹⁶¹ South Africa, which has traditionally been both a capital-exporting and capital-importing state is in the process of revamping its BIT program by pursuing distinguishing policies between agreements with capital-exporting and capital-importing states.¹⁶² And member states of the European Union (EU) are currently in the midst of a policy overhaul as a result of the *Treaty of Lisbon*,¹⁶³ which grants exclusive competence to the European Commission (EC) over the regulation of foreign direct investment.¹⁶⁴ While the details on how this will shift member state authority over its BIT programs remains blurry, it will nonetheless require all member states to address their policies towards foreign direct investment in the coming years.¹⁶⁵ There are indications that, while continuing to pursue investor protective

¹⁵⁹ Jürgen Kurtz (2012). *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*. ICSID Review. Vol. 27, p. 65.

¹⁶⁰ This trend has manifest itself in the debate on whether to include investor-state dispute settlement provisions in the *Trans-Pacific Partnership Agreement* that is currently under negotiation. See Jeffrey Schott, et al. (2013). *Understanding the Trans-Pacific Partnership. Policy Analyses in International Economics*. Washington. Peterson Institute for International Economics.

¹⁶¹ Cai Congyan (2009). *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*. Journal of International Economic Law. Vol. 12, p. 457.

¹⁶² *Bilateral Investment Treaty Policy Framework Review*. June 2009, Republic of South Africa, Department of Trade & Industry, available at: <http://www.info.gov.za/view/DownloadFileAction?id=103768> (last accessed 1 September 2013); see also Randall Williams (2009). *Nothing Sacred: Developing Countries and the Future of International Investment Treaties*. The Third Annual Forum of Developing Country Investment Negotiators. Winnipeg, IISD.

¹⁶³ See Articles 206 & 207, *Treaty of Lisbon Amending the Treaty on European Union & the Treaty Establishing the European Community (Treaty of Lisbon)*. 13 December 2007, 2007/C 306/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> (last accessed 1 September 2013).

¹⁶⁴ Jan Kleinheisterkamp (2012). *Investment Protection and EU Law: The Intra and Extra EU Dimension of the Energy Charter Treaty*. Journal of International Economic Law. Vol. 15, p. 85; Wenhua Shan & Sheng Zhang (2011). *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*. European Journal of International Law. Vol. 21, p. 1049.

¹⁶⁵ Jansen Calamita (2012). *The Making of Europe's International Investment Policy: Uncertain First Steps*. Legal Issues of Economic Integration. Vol. 39, p. 301.

agreements, the EC is exploring ways that it can bind arbitrators to more exacting standards of treatment.¹⁶⁶

The most radical recent shift in policy, however, has come in the denunciation of the *ICSID Convention* from a few Latin American states.¹⁶⁷ These include Bolivia, Ecuador,¹⁶⁸ and most recently Venezuela.¹⁶⁹ Likewise, and in the wake of huge liabilities resulting from a number of investor-state awards (of which it has refused to pay), Argentina is currently considering withdrawal from the *ICSID Convention* as well.¹⁷⁰

4.4.2 The Continued Development of the Investment Regime

Despite the perceptions that investment treaty arbitration is being developed by a cadre of international lawyers who favor investor-claimants, the end of the 2000s indicate that states still largely endorse an international regime on the protection of foreign direct investment. While high-profile examples of dissatisfaction with the regime may provide some evidence that the regime is under strain, they remain fairly isolated in reality. Countries continue to sign BITs; and even more interesting is the current upsurge in the negotiation of FTAs from all types of states: small, large, developed, developing, capital-exporting, and capital-importing.

There were 11 FTAs and 33 BITs signed in 2011,¹⁷¹ and 10 FTAs and 20 BITs signed in 2012.¹⁷² There also remain active negotiations on treaties that would provide protections for significant portions of global foreign direct investment flows currently unprotected by the regime. Notable is the ongoing negotiation of the US-China BIT.¹⁷³ As two of the world's largest exporters and importers of foreign capital, the final version of this treaty will be an important signal to

¹⁶⁶ Regulation No. 1219/2012 of the European Parliament & of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States & Third Countries. 12 December 2012, OJ L 351/40, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150494.pdf (last accessed 1 September 2013).

¹⁶⁷ See Leon Trakman (2012). *The ICSID Under Siege*. Cornell International Law Journal. Vol. 45, pp. 603, 604.

¹⁶⁸ In 2008, Ecuador terminated its BITs with nine countries: Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay. In a recent news article, Ecuador is claiming that it will attempt to terminate *all* of its investment treaties by May 2013. See Mercedes Alvaro (2013). *Ecuador Expects to End All Investment Treaties by May*. Dow Jones Newswire, 15 March.

¹⁶⁹ In 2008, Venezuela also terminated its BIT with the Netherlands.

¹⁷⁰ Sebastian Perry (2013). *Is Argentina About to Leave ICSID?* Global Arbitration Review, January 25.

¹⁷¹ See Zahn, *supra* note 33 at p. 86.

¹⁷² See Zahn, *supra* note 35 at p. 101.

¹⁷³ Gary Born, et al. (2012). *United States to Resume Bilateral Investment Treaty Negotiations on the Basis of a Revised Model Treaty*. Wilmer Hale News, 15 May, available at: <http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=89748> (last accessed 1 September 2013).

the investment treaty regime as it is likely to reflect the balanced or recalibrated BIT that opponents of the BIT regime desire; and it may even prove to be a template for a future attempt at negotiating a multilateral investment treaty.¹⁷⁴ With that said, a multilateral investment treaty akin to that of the global trading regime remains unlikely in the near future: while the approximately 3000 BITs and FTAs creates a significant regime on its face, closer inspection reveals that states would have to sign an approximately 9000 more bilateral treaties to reach the same amount of coverage as the basic WTO agreement with its 147 member state signatories.

In this recent period, the negotiation of BITs has tapered off compared to its apex in the 1990s, but the number of awards rendered has not. According to Alvarez, 73 percent of the total number of awards rendered in investment treaty arbitrations have come in the last five years.¹⁷⁵ Combined with both an increasing number of legal scholars and academics working specifically on investment treaty arbitration issues and many global law firms developing large practices for investor-state disputes, the discursive scrutiny of investment treaty arbitration is rapidly expanding. The increase in the number of cases, the large amounts of money at dispute, and a few high profile cases (such as the *Chevron v. Ecuador* case¹⁷⁶) have also brought investment treaty arbitration to the attention of a wider array of civil society actors as well.

While it would be generous to claim that investment treaty arbitration has entered an era of general public discourse, it certainly now receives nearly as much attention (if not more) as any other area of international law. However, while it is true that the number of cases has expanded greatly in the past decade, there are indications that this number could certainly continue to rise exponentially in the coming decade. There are currently about 350 investor-state cases that have been resolved with about 100 currently pending.¹⁷⁷ While this may seem like a large caseload, it pales in comparison to the number of potential claims. According to Michael Reisman, a simple calculation of the global number of registered multinationals and their subsidiaries is at least

¹⁷⁴ Karl Sauvant & Huiping Chen (2012). *A China-US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?* Columbia FDI Perspectives No. 85, Vale Columbia Center on Sustainable Investment Law, available at: <http://www.vcc.columbia.edu/content/china-us-bilateral-investment-treaty-template-multilateral-framework-investment> (last accessed 1 September 2013).

¹⁷⁵ José Alvarez (2012). *The Paradoxical Argentina Cases*. London, Wilmer Hale Scholar-in-Residence Lecture, December 17.

¹⁷⁶ *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador* (PCA Case No. 2009-23). 27 February 2012, Third Interim Award on Jurisdiction & Admissibility.

¹⁷⁷ These numbers reflect the ICSID caseload. There are also a number of cases at the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the Permanent Court of Arbitration (PCA), and non-institutional cases under the UNICTRAL rules. For the ICSID caseload, see 'Cases,' ICSID website, available at: <https://icsid.worldbank.org/ICSID/Index.jsp> (last accessed 1 September 2013).

180,000.¹⁷⁸ This means that the 512 cases to date may be a mere small fraction of future claims. This fact may foster additional instability for the regime as investor-state arbitration becomes more popular and well-known as a means for adjudicating international disputes.

4.4.3 The Annulment of Argentine ICSID Decisions

However, at this current stage in the development of the regime, the Argentina cases continue to stand in the fairness and legitimacy discourse with many of the cases decided in the 2000s now moving their way through the ICSID's annulment process.¹⁷⁹ Where there was some inconsistency in the early awards, the ICSID annulment process¹⁸⁰ has produced a wide array of decisions that have muddled and confused the jurisprudence considerably.¹⁸¹ From the perspective of consistency across decisions, the Argentine cases do not help the perception that arbitration is an ill-suited dispute settlement mechanism for the types of cases these arbitral tribunals are tasked with adjudicating. While the annulment process is not an appeals mechanism, it appears that annulment committees have nonetheless tried to act as appellate bodies in some cases. Famously, the *CMS v. Argentine Republic* decision on annulment criticized much of the original award, but refused to annul it. This leaves Argentina having to contemplate paying on an award that is valid, but which has been severely undermined by the annulment committee.

What is more curious, however, is the fact that a number of the annulment committees have decided to annul or uphold the original awards according to very different reasoning than that which was used in many of the original tribunals. This is especially the case in regard to the defense of necessity. What is quite astonishing is that, while not all of the early Argentinian awards were annulled (and the ones that were annulled gave disparate reasons for their decisions), they are fairly consistent in taking a much more sympathetic view of the Argentinian position and how it responded to its economic crisis. It

¹⁷⁸ Michael Reisman (2009). *International Investment Arbitration and ADR: Married But Living Apart*. ICSID Review. Vol. 24, pp. 185, 186.

¹⁷⁹ As of 1 September 2013, there are five pending annulment proceedings and five decisions on annulment. The decisions on annulment include: *Continental Casualty Co. v. Argentine Republic* (ICSID Case No. ARB/03/09). 16 September 2011, Decision on Annulment; *Enron Corp. & Ponderosa Assets v. Argentine Republic* (ICSID Case No. ARB/01/3). 30 July 2010, Decision on Annulment; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16). 29 June 2010, Decision on Annulment; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12). 1 September 2009, Decision on Annulment; *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8). 25 September 2007, Decision on Annulment.

¹⁸⁰ It is important to note that the ICSID annulment process is not an appeal mechanism and therefore mandates a limited number of grounds to which an award can be annulled. This process is generally aimed a gross abuse of process claims and is not the appropriate type of mechanism for garnering consistency across awards.

¹⁸¹ For a good discussion of the differences among Argentine decisions on annulment, see Alvarez & Topalian, *supra* note 98.

appears that the investment arbitration community, and especially the arbitrators themselves, are engaged in a form of self-regulating behavior. Why is it that the initial awards against Argentina found one way, and five to seven years later (and in the midst of a global recession) they found differently? While this is an oversimplification of the jurisprudence, it is perhaps a bit surprising that so-called ad hoc arbitrators would be concerned with shaping and stabilizing the investment regime at all. If these arbitrators saw their role as truly one-off and ad hoc adjudicators, it is unlikely that they would be so driven to produce a consistent body of jurisprudence over time. And while this is not always a clean and tidy process in any adjudicative system, investment treaty arbitrators do appear to be engaged in just such a process.

For critics of the investment treaty regime, the problem with this approach is that it is unclear whether states have delegated this authority to arbitrators. Detractors of the regime oppose the view about the wide authority of arbitrators to develop the regime overall. However, it could be tacitly assumed that the underdeveloped and broadly worded protection standards in BITs meant that states were not looking for a strictly proscribed principal-agent relationship between state parties and arbitrators, but that they were proscribing a delegation relationship whereby arbitrators would be entrusted to develop and clarify the imprecise standards in BITs.¹⁸² A delegation theory is helpful for explaining arbitral practice in investor-state cases, but it does not explain whether or not this is the approach that states actually endorsed when agreeing to dispute settlement mechanisms in BITs and FTA investment chapters.

4.4.4 The Focus on Substantive Standards

In addition to the controversies surrounding the Argentina cases, there are also a number of new cases that have drawn scrutiny on the interpretation of specific standards of protection in BITs.¹⁸³ Most typically, one sees recurrent focus on most-favored nation (MFN) treatment,¹⁸⁴ the standard for analyzing

¹⁸² Alec Stone Sweet & Florian Grisel (2009). 'Transnational Investment Arbitration: From Delegation to Constitutionalization?' in Pierre-Marie Dupuy, ed. *Human Rights in International Investment Law and Arbitration*. Oxford, OUP; compare with Andrew Guzmán (2008). *The Myth of International Delegation*. California Law Review. Vol. 96, p. 1693.

¹⁸³ By no means do the Argentina cases represent the truly global nature of investment treaty arbitration. As of 1 September 2013, 102 countries have been respondents in ICSID cases.

¹⁸⁴ The scope of MFN clauses in BITs has created a large literature. See e.g. Tony Cole (2012). *The Boundaries of Most Favored Nation Treatment in International Investment Law*. Michigan Journal of International Law. Vol. 33, p. 537; Julie Maupin (2011). *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?* Journal of International Economic Law. Vol. 14, p. 157; Zachary Douglas (2011). *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails?* Journal of International Dispute Settlement. Vol. 2, p. 97; Stephen Schill (2009). *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*. Berkeley Journal of International Law. Vol. 27, p. 496; Jarrod Wong (2008). *The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral*

indirect expropriations, the scope of the fair and equitable treatment (FET) standard, and the definition of investors and investments under applicable BITs.¹⁸⁵ What all of these debates have in common are that they relate to an underlying ideology about the intended scope of BITs and whether these provisions should be read narrowly or expansively.¹⁸⁶ Arbitrators have addressed the scope of these standards in a variety of ways, fueling the discourse about proper interpretation of these provisions under international law. With limited exception, arbitrators are increasingly aware of the close scrutiny that their awards will receive and therefore provide extensive reasoning in their awards. Since the scope of these provisions are rarely defined in explicit and specific terms, the interpretations tend to be driven by a set of underlying values that arbitrators wish to endorse when rendering their decisions. This means that decisions are almost never objectively right or wrong, but rather they reflect ideological preferences.

Take for example the issue of what constitutes an investor. First, it is important to note that every BIT is unique. Yes, there are vast similarities in standards and language among the BITs, but one must look at the specific wording of each BIT and not make far reaching generalizations. The debate about what constitutes an investor has been an important topic in the overall legitimacy debate because depending on how arbitrators interpret this threshold issue will determine whether the tribunal has jurisdiction to hear the case at all. A very narrow definition of what constitutes an investor and an investment is likely to preclude a large number of claims from being heard. This is precisely the goal intended by those who believe that investment treaty arbitration should be much more curtailed than its current practice. However, investment arbitration appears to be going the opposite direction. In the recent case of *Abaclat v. Argentina*, the tribunal granted jurisdiction over a dispute relating to 60,000 Italian bondholders who invested in Argentinian bonds.¹⁸⁷

Investment Treaties. Asian Journal of WTO & International Health Law & Policy. Vol. 3, p. 171; Scott Vesel (2007). *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation in Bilateral Investment Treaties*. Yale Journal of International Law. Vol. 32, p. 125.

¹⁸⁵ The definition of investment in BITs has created a large literature. See e.g. Daniella Strik (2012). *Investment Protection of Sovereign Debt and Its Implications on the Future of Investment Law in the EU*. Journal of International Arbitration, Vol. 29, p. 183; Govert Coppens (2011). 'Treaty Definitions of Investment and the Role of Economic Development: A Critical Analysis of the Malaysian Historical Salvors Cases,' in Vivienne Bath & Luke Nottage, eds. *Foreign Investment and Dispute Resolution Law and Practice in Asia*. London, Routledge; Julian Mortenson (2010). *The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law*. Harvard International Law Journal Vol. 51, p. 257; Patrick Dumberry (2010). *The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?* Michigan State Journal of International Law. Vol. 18, p. 353; Mahnoush Arsanjani & Michael Reisman (2010). *Interpreting Treaties for the Benefit of Third Parties*. American Journal of International Law. Vol. 104, p. 597.

¹⁸⁶ August Reinisch (2011). *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?* Journal of International Dispute Settlement. Vol. 2, p. 115.

¹⁸⁷ *Abaclat & Others v. Argentine Republic* (ICSID Case No. ARB/07/5). 4 August 2011. Decision on Jurisdiction & Admissibility; see also Stacie Strong (2012). *Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime?* University of

Not only was there not direct investment in this case, it is the first investment treaty case to grant jurisdiction to a mass claim.

4.4.6 The Need for a Standard of Review?

In addition to the analysis of specific standards, the overall interpretive scope granted to arbitrators also continues to be debated. The issue about the public nature of the regime and its parallels to administrative law has produced a number of scholarly articles and discussions about whether investment treaty arbitrators should adopt a formal or informal standard of review.¹⁸⁸ In what has been described as the next battleground investment treaty arbitration, the applicable standard of review used by investment tribunals has varied, and as such, a significant discourse on the appropriate standard of review has been under discussion for a number of years.

There are two initial hurdles, however. First, no investment treaties specify a standard of review; and second, even if they did, such a standard would have to be included in all BITs and FTA investment chapters in order to be cohesively applied across thousands of bilateral or plurilateral agreements. There are still a number of options available. For example, the US Supreme Court has developed a sophisticated standard of review for cases deriving from the fourteenth amendment of the US Constitution despite the fact that the wording of the amendment is silent on an applicable standard of review. Likewise, and more directly applicable to investment treaty arbitration, the European Court of Human Rights (ECtHR) has developed a margin of appreciation doctrine as its standard of review through its jurisprudence alone.¹⁸⁹

Missouri School of Law Legal Studies Research Paper No. 2012-17, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083219 (last accessed 1 September 2013).

¹⁸⁸ Stephen Schill (2012). *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*. Journal of International Dispute Settlement. Vol. 3, p. 577; Rahim Moloo & Justin Jacinto (2012). 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law,' in Karl Sauvant, ed. *The Yearbook on International Investment Law & Policy, 2011-2012*. Oxford, OUP; Carline Foster (2012). *Adjudication, Arbitration and the Turn to Public Law 'Standards of Review: Putting the Precautionary Principle in the Crucible*. Journal of International Dispute Settlement. Vol. 3, p. 525; Caroline Henckels (2013). *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration*. Journal of International Dispute Settlement. Vol. 4, p. 197; Anthea Roberts (2011). *The Next Battleground: Standards of Review in Investment Treaty Arbitration*. International Council for Commercial Arbitration (ICCA) Series. Vol. 16, p. 170; William Burke-White & Andreas von Staden (2010). *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*. Yale Journal of International Law. Vol. 35, p. 1; Alec Stone Sweet (2010). *Investor-State Arbitration: Proportionality's New Frontier*. Law & Ethics of Human Rights. Vol. 4, p. 1.

¹⁸⁹ Andrew Legg (2012). *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*. Oxford, OUP.

While it is clearly possible for courts to establish and develop standards of review, the problem for investment treaty arbitration is the fact that it lacks a standing court with authoritative precedent. Absent such an authority, it may be difficult to get all investment arbitrators to agree to a specific standard of review for ad hoc investment treaty arbitrations that require the interpretation of the varied and non-unitary bilateral agreements upon which they must render decisions.

4.4.7 The Rise of the System Destroyers

While the debate among scholars and practitioners on the interpretive scope of investment treaties continues, the increasing number of actual awards available for analytical reflection is also giving rise to commentators who oppose investor-state dispute settlement in all its forms. For these critics, viewing the evolution of the investment regime as an increasingly consistent rules-based legal order is irrelevant because the very fact that investment claims are capable of international adjudication is an untenable premise. While some scholars, most notably Jason Webb Yackee,¹⁹⁰ have advocated a minimalist version of international investment law that would revert to (the good old days of?) custom, contracts, and diplomatic protection to manage investment disputes, others go much further. In 2010, a large group of important international lawyers and academics issued a public statement on the international investment regime holding that, *inter alia*,

[t]here is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.¹⁹¹

While this approach seems to be hypercritical of an international rule of law, it specifically targets BITs and investment treaty arbitration. For these scholars, investment treaty arbitration is the enemy of the state, and this kind of statist perspective is gaining more support, not less, in the current literature from both insiders and outsiders. The problem with such a destructive viewpoint is that it presents difficulties for any kind of consensus-building. If the entire regime is unsalvageable, then there are no reforms or concessions that will be tolerated.

Another prominent stream of criticism about the regime stems from accusations that investment treaty arbitration is a regime driven by opportunist international lawyers who have sought to build up investment treaty arbitration purely as a means of generating profit. A recent report titled

¹⁹⁰ Webb Yackee, *supra* notes 95.

¹⁹¹ *Public Statement on the International Investment Regime*, *supra* note 137.

*Profiting from Injustice*¹⁹² claims that investment treaty arbitration is both unfair and illegitimate because it is biased in favor of investor-claimants. This is nothing new, however. What is new in the report is the evidence showing just how dominant a small number of firms and a small number of arbitrators have been in shaping this burgeoning field of legal practice. It accuses law firms of chasing cases and then charging exorbitant fees to litigate them. The report also accuses investment treaty arbitration as being so slanted towards investors that it affects the neutrality and independence of arbitrators as well. Such a view holds that, since only investors can initiate claims under BITs, arbitrators have a vested interest in supporting a pro-investor perspective. Because arbitrators want future appointments, they are likely to favor the claimant's position.¹⁹³

While the claims in this particular report are hyperbolic and not an accurate reflection of the goals that investment treaty arbitration seeks to achieve, it nonetheless summarizes many of the ongoing criticisms against the regime. However, in attempting to show that the regime is apparently biased, these authors have issued a report that is actually biased. All absurdity aside, it is important that those with a vested interest in investment treaty arbitration would respond to, and take seriously, many of its criticisms if it is to flourish as a legitimate form of international adjudication in the coming decades.¹⁹⁴

5. SOLVING THE FAIRNESS DEBATE

Given all of the claims being hurled against investment treaty arbitration, the next question to ask is: what can be done to remedy its perceived inadequacies? This is an extremely difficult question given many of the structural limitations in the current regime. It is unlikely that any minor tweaks will alter current perceptions. There are essentially three broad options: 1) make minor reforms but leave the same structure in place, 2) completely tear down the regime and eliminate the possibility for investor-state disputes, or 3) develop a framework for a multilateral agreement on investment that supersedes all of the bilateral agreements currently in place. The first option is most likely given the diversity of global interests involved and the fact that the largely bilateral structure of investment treaty law would be difficult to dismantle completely.

¹⁹² Pia Eberhardt & Cecilia Olivet (2012). *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom*. Brussels, Transnational Institute.

¹⁹³ For a counter-position based on empirical research, see Daphna Kapeliuk (2012). *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*. Review of Litigation. Vol. 31, p. 267; Daphna Kapeliuk (2010). *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*. Cornell Law Review. Vol. 96, p. 47.

¹⁹⁴ See Toby Landau (2011). *Saving Investment Arbitration from Itself*. London, Freshfields Bruckhaus Deringer Arbitration Lecture, 30 November.

To facilitate this first option (or any of the three options for that matter), the value perspectives of those knowledgeable about the regime are important. While many of the values embedded in the regime are being shaped by the discourse already, it is the claim of a theory of configurative fairness that a systematic approach to gaining knowledge about the values supported by participants in the regime can assist in further refining the fairness discourse in investment treaty arbitration. The following Chapter will demonstrate how Q methodology can be utilized in the context of the fairness discourse in investment treaty arbitration. While this first attempt at analyzing the fairness discourse through Q methodology is likely to be viewed as incomplete and not definitive, it is hoped that future Q method studies on the value discourse in investment treaty arbitration can provide strong empirical evidence about the way that decisionmakers ought to develop the rules and principles governing investment treaty arbitration in the future.

CHAPTER 8

CONFIGURING FAIRNESS IN INVESTMENT TREATY ARBITRATION

1. INTRODUCTION

The primary function of a theory of configurative fairness is to generate a theoretical frame of inquiry for evaluating subjective value choices in the context of evolving legal orders. Such an orientation presupposes that fairness can be configured according to what lawmaker and lawtakers of a particular legal order consensually value. It also presupposes that the development of the law is essentially a process whereby legal principles, norms, and rules are dynamic, not static. In this context, a theory of configurative fairness is a vital frame of inquiry for organizing developing or evolving legal orders as based on considerations of fairness: that is, what participants consider to be fair, not what one claims to be objectively just. A legal order achieves fairness if its legal rules, principles, procedures, and norms conform with an overlapping consensus of the values that its users would endorse.

However, determining which values should (or do) inform the development of legal rules can be a tricky endeavor. As explained in depth in previous Chapters, the pursuit of value knowledge is complicated by its subjectivity. The goal of a theory of configurative fairness is not in the justification of a set of objective values, but in the discovery of shared value subjectivities. The fundamental claim of a theory of configurative fairness is that a legal order can only be configured fairly once these shared value subjectivities are discovered; and discovery of these shared subjectivities requires an empirical methodology for uncovering the often unobservable claims, demands, and expectations (perspectives) about value that participants and users of a particular legal order hold. Since this proposed theory and method for configuring evolving legal orders is necessarily general and abstract, it is important to apply it to a specific legal regime or system that is currently in a state of evolutionary flux. To do this, international investment treaty arbitration has been selected as a case for the application of a theory of configurative fairness in practice.

Investment treaty arbitration is a relatively simple concept, and yet it has been one of the more controversial developments in international law over the past fifty years. The controversial nature of investment treaty arbitration relates to the procedures for its use, the types of claimants and claims that can be arbitrated, the scope of the substantive provisions in bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters that can be breached by states, and whether or not investor-state disputes of the

type allowed in BITs and FTAs should even be permitted at all.¹ As such, regime-design² issues debated in the discourse run the gamut: from very specific technical rules about the procedure of investment treaty arbitration to broad claims about the overall fairness and legitimacy of the regime in general. As a rapidly changing or evolving international legal order, these regime-design issues are ideal for the application of Q methodology and a theory of configurative fairness. The focus of the Q method study analyzed in this Chapter relates to these systemic questions about how such a form of international dispute settlement ought to be configured – or designed – as perceived through the subjective discourse.

It is this discursive process about subjective value claims that is focus of this work. From a consensus-building perspective, the claims, demands, and expectations that legal participants have about the right distribution of value are central. However, given the subjective nature of value knowledge, a scientific determination of what both lawmakers and lawtakers involved with this legal order value can be difficult to ascertain. This is where Q methodology studies have the potential to add significant insight. While some objective knowledge about investment treaty arbitration can be evaluated in terms of actual past practice, making predictions about the future development of the investment treaty arbitration legal order requires knowledge about the subjective value preferences that decisionmakers and discourses actually endorse. Since these underlying worldviews and perspectives about the appropriate distribution of value are often unobservable, a means of making this empirically unobservable knowledge observable is the main contribution of this work. Through the use of Q methodology, subjective phenomenon can be made observable through the discovery of shared subjectivities. By asking decisionmakers and discourses how they believe the rules, norms, principles, and procedures of the investment treaty arbitration legal order ought to be configured, Q methodology can analyze and map what users of this legal order actually value.

Q methodology can provide a holistic map of individual perspective. In the context of investment treaty arbitration, these perspectives influence and shape the way that legal problems are approached in both the discourse and in legal decisionmaking. Subjective perceptions, whether right or wrong, will have a tremendous impact on how one views the way that values ought to be configured and distributed. The goal of the Q method study highlighted in this

¹ See Chapter 7.

² The term regime is being used to differentiate it from a system. It will be used throughout this work to refer to particular international legal orders. A legal order described as a regime may be less comprehensive and cohesive than a legal order conceived as a system of law. A regime, as used in this work, is taken from Stephen Krasner who defines an international regime as: “[i]mplicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen Krasner (1983). ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables,’ in Stephen Krasner, ed. *International Regimes*. Ithaca, Cornell University Press.

Chapter is to identify where perspectives on the fairness debates in investment treaty arbitration converge and diverge among participants in the study. This information will lend insight into how both discourses and decisionmakers view the world holistically in relation to the many issues in investment treaty arbitration; and will help develop knowledge about what users of this legal order value – and thus consider as fair. Such a purpose presupposes that, despite divergent viewpoints and perspectives, there are specific values that are endorsed across these perspectives that form an overlapping consensus.³

It is these overlapping value claims that are most likely to be considered fair by all participants and therefore can be used as a foundation for tracking the future evolution of the regime. Q methodology, as distinct from surveys or questionnaires, requires that participants rank-order subjective statements about a topic in relation to each other. When a consensus emerges, it is not a reflection of a statement to which participants agreed with in isolation from the other statements, but is a reflection of consensus about that statement in the context of its relation to other statements in the Q study (a form of prioritization). In this way, Q method is a unique methodology that can both qualify a statement in terms of agreement or disagreement, but also in terms of its priority in relation to other statements.

While the Q method study will be discussed in detail below, a quick example may help set the stage. In the Q method study conducted, the following statement situated itself in a similar location on the Q sort matrix across all the perspectives that emerged:

[c]ollegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.⁴

Across all the diverse perspectives that formed factors in the Q method study, this statement was rejected by all the participants and almost exclusively placed at the strongly disagree end of the Q sort spectrum. Among those who participated in the study, there is a significant overlapping consensus on this issue. The questions that will arise in interpreting the results of this Q method study will include: what does this mean in terms of value configuration and fairness, what is the value that such a statement represents, and does reflecting on how to interpret this statement require that the researcher or interpreter impose her own subjective perspective on its meaning? Since there is a significant interpretive element in any Q method study, these questions can only be answered subjectively. However, one of the assets of Q methodology is that it provides empirical data that has been suspended in time for all to reflect upon. Even if the interpretation that the researcher gives

³ See Chapter 5, Section 4.3.1.2.

⁴ See Annex I, Table 2, Statement 3.

merely reflects her opinion, the raw data can be viewed by anyone interested in looking. The overlapping consensus contained in the statement identified above is a scientific reduction of the multiple opinions of the participants conducting the study. It is pure subjectivity: that is, the Q sorts used to analyze the data in the Q study are a snapshot of each individual's opinions about the subject upon which they were asked to reflect. It is their opinion, not the researchers. Therefore, this work has gone to great lengths to provide as much of the raw data as possible from the study itself. Even if one disagrees with the interpretive analysis, the information can be inspected on its own terms, and anybody wishing to look can draw their own conclusions as to what the data means.

The aforementioned statement on collegiality provides a good example of the type of work that Q methodology and a theory of configurative fairness seeks to accomplish. Yet, it is but one of many 'surprising facts'⁵ that emerges from the study. The Q method study, titled: *Measuring the Immeasurable: Fairness Discourse in Investment Treaty Arbitration*,⁶ asks participants knowledgeable about investment treaty arbitration to rank-order a set of subjective statements about the regime from most agree to most disagree, and in relation to each other. This Q sort procedure was conducted according to the following condition of instruction:

[i]n looking to the future of investment treaty arbitration, sort the following statements from most agree to most disagree according to your perspective on how a fair legal order of this type ought to be configured.⁷

The study asked participants to reflect upon forty subjective statements about investment treaty arbitration and to place them accordingly in a Q sort matrix.

The Q sort was conducted through an online tool for the application of Q methodology.⁸ The statements are all subjective in nature and were taken from over 10,000 pages of highly-ranked journal articles over a two year period between mid-2009 and mid-2011.⁹ The results of the study produced six distinct factors or perspectives that represent shared ways of thinking on the topic of fairness in investment treaty arbitration. While it was predicted that a

⁵ Q Method studies are based on the logic of abduction, and "[a]bduction always begins with the detection of a surprising empirical fact." Simon Watts & Paul Stenner (2012). *Doing Q Methodological Research: Theory, Method, and Interpretation*. London, Sage, p. 39. Abduction, which was first formalized by Charles Peirce, "consists in studying the facts and devising a theory to explain them." Charles Peirce (1931 & 1958). *Collected Papers, Volume 1 through 8*. Cambridge, Harvard University Press, p. 90.

⁶ *Measuring the Immeasurable: Fairness Discourse in Investment Treaty Arbitration*, available at: www.fairnessdiscourse.org (last accessed 1 September 2013).

⁷ Id.

⁸ Id.

⁹ The journals selected all ranked highly according to the journal ranking project at the Washington and Lee University Law Library. See *Law Journals: Submissions & Rankings, 2005-2012*, available at: <http://lawlib.wlu.edu/lj> (last accessed 1 September 2013).

pro-investment treaty arbitration and an anti-investment treaty arbitration perspective would emerge, the six perspectives are actually much more nuanced and reflect a deep understanding of the regime and its most controversial issues. In addition to the six factors or perspectives, the Q method study also uncovered a number of additional empirical phenomena about the amount of agreement and disagreement across factors. Each of the six perspectives will be described, including points of consensus and disagreement that emerged across factors.

This Chapter will proceed as follows. The first section will present a brief overview of regime-building or design issues as they relate to investment treaty arbitration. This section will attempt to incorporate and synthesize the fairness and legitimacy debate highlighted in the previous Chapter, and to relate this debate to its role in determining how a legal order such as investment treaty arbitration is (or should be) constructed over time. The second section will introduce the Q method study and the experimental design, including a discussion of the categories from which the study statements were selected. The third section will interpret the results of the study by providing a distilled narrative of each of the six perspectives that emerged. This section will also include a discussion of the points of consensus and disagreement across factors and how such knowledge can be used to configure fairness in investment treaty arbitration. While the Q method study provides very interesting results, this work is intended to present an idea about how subjective perceptions can be measured in a manner that permits analytical and empirical insight in jurisprudential thought. Therefore, while the outcomes of this Q method study may provide useful empirical knowledge about the fairness discourse in investment treaty arbitration, humility requires that the outcomes of the Q method study should not be taken as definitive answers about the questions posed, but rather, as a first try at the advancement of social scientific knowledge in this area.

2. REGIME-BUILDING AND INVESTMENT TREATY ARBITRATION

The purpose of this application of a theory of configurative fairness is aimed at the design issues relating to the development of investment treaty arbitration, and how value knowledge can be used to build consensus on many of investment treaty arbitrations most difficult issues. To do this, one must be able to reflect on the values endorsed by the procedural mechanisms of investment treaty arbitration, but also on the substantive laws that are eligible for arbitration under investment treaties. In addition to the provisions provided in BITs, this also includes broader principles of general international law and customary international law. It also, in many cases, requires arbitrators to make inquiries into the compatibility of national law with that of international law. The subject-matter derived from the substantive provisions

in specific investment treaties therefore often requires both a vertical and horizontal extension of scope outward from these treaties: vertically, between the relationship of international law and national law, and horizontally, between the relationship of international investment law and other areas of international law.

The question for a theory of configurative fairness is how best to configure the scope and operation of investment treaty arbitration in the so-called BIT generation.¹⁰ Most, but not all, BITs and FTAs with investment chapters, include dispute settlement provisions; and these dispute settlement provisions, while not uniform, generally grant an investor with home state nationality with a standing offer to arbitrate a dispute against the state hosting the investment. Normally, and unlike traditional diplomatic espousal cases, the home state is not involved at all in the dispute. Once initiated, arbitrators are selected, and are called upon to decide upon both the jurisdictional and substantive claims against the host state.

In looking to design an international adjudicative regime, a number of important issues arise: 1) should arbitrators, as opposed to judges, be vested with the power to decide cases arising out of investment treaties, 2) are investor-state arbitrations a better model of international dispute settlement than that of diplomatic protection, 3) how ought arbitrators decide the case before them, 4) what is the interpretive scope of their mandate, 5) should international adjudicative mechanisms be permitted to pierce the veil of a sovereign state in order to reflect on the regulatory choices that states make, and 6) are their better procedures for resolving these types of disputes?

Answers to these questions all turn on the perspectives of value distribution (and hence fairness) that human beings involved in this legal order hold. These value perspectives, in turn, influence and motivate the way that human decisionmakers approach these adjudicative design issues. Some of these value considerations are moral or ethical, some are political, and some are merely cognitive or epistemic. They are all subjective. A theory of configurative fairness seeks to understand where these subjectivities are shared, and to configure legal orders according to the subjective value distribution claims that its users would endorse.

Someone who holds a particular vision of the political value of democracy in high esteem may also hold that the delegation of dispute resolution to a panel of unelected arbitrators is a derogation of a value that they strongly believe in. Likewise, someone who believes in the cognitive values of consistency and coherence as a fundamental value for any system of law may want these values to take precedence in designing any system of adjudication, even if it is

¹⁰ See Michael Reisman & Robert Sloane (2004). *Indirect Expropriation and its Valuation in the BIT Generation*. British Yearbook of International Law. Vol. 75, p. 115.

to the detriment of other values. And the list goes on and on. The first step for a theory of configurative fairness is to identify these value choices and to determine where and when they are shared. Sometimes these value positions will become intractable situations that are unresolvable. But it is the basic claim of a theory of configurative fairness that value claims, while subjective, are identifiable, and that once they are identified, they can be used to build consensus on many of the most complicated and difficult design issues in jurisprudential thought.

All of the major structural issues listed above present many challenges for how the rules and procedures of investment treaty arbitration ought to be configured. And yet, there is no simple formula that would provide the correct answer. In seeking a consensus that would result in a fair configuration of investment treaty arbitration, the subjective voices of its proponents and opponents must be amenable to empirical analysis. Looking at the discourse without the assistance of Q methodology may produce claims that the various ideological positions of the discourses would prevent a consensus from ever forming. For example, the discourses who believe that the investment treaty regime is 'rigged' against the interests of developing states and that such a system only reinforces neocolonial imperialism, it is difficult to see how an underlying value consensus about the regime's future could ever develop. However, this is precisely where the scientific study of subjectivity can advance knowledge about legal regime consensus. It may be that these dissenters about the investment treaty arbitration regime are mere outliers, or that contrary to even their own beliefs, they have compatible and overlapping value preferences with the most ardent supporters of the regime. In fact, the analysis of the Q method study described below does indicate that such latent, possible unconscious, value perspectives do exist in the discourse.

The policy-orientated perspective of the New Haven school tells us that law, as the ongoing process of legal decisionmaking, is a reflection of the subjective value distribution in any given legal context.¹¹ In order to be both authoritative and controlling, this means that power alone is usually not enough to compel action. Consensus-building requires that the value claims made by both lawmakers and lawtakers of any evolving legal order must reflect an overlapping consensus or balance about the distribution of value; and that if this can be achieved, there is a great likelihood that the legal order will be viewed as legitimate and fair by decisionmakers and discourses alike.

¹¹ See Chapter 4, Section 4.

3. THE Q METHOD STUDY ON INVESTMENT TREATY ARBITRATION

The Q method study on configuring fairness in investment treaty arbitration attempts to distill the multiple issues under debate in regard to the overall regime-design in a way that permits participants in the study to reflect comprehensively and holistically about how they believe the future investment treaty regime ought to be configured. So while a participant may have dedicated views on, say for example, the theoretical scope of most favored nation (MFN) clauses found in BITs, this study asks participants to announce that view in the context of all of the other issues also under debate. This will permit the researcher to evaluate where such a theoretical orientation fits in with one's overall viewpoint or perspective about the appropriate value distribution for the regime as a whole. Q methodology allows for a holistic view of a participant's opinion by focusing on the priorities that one gives to a statement in a Q sort as relative to all of the other statements in the Q sort. These individual Q sorts can then be correlated to determine where, and if, a consensus across Q sorts is determinable after subjecting these Q sorts to factor analysis.¹² The shared perspectives that emerge are called the factors. These factors describe where statements placed in Q sorts cluster across individuals.

In this study, 45 participants completed the Q sort. After factor analyzing these Q sorts collectively, six perspectives or factors emerged that constitute 49 percent of the total study variance.¹³ As a tool of data reduction,¹⁴ it is apparent then that this Q methodology study effectively reduced the 45 individual perspectives down to six collective perspectives or factors that reflect shared thinking on this particular topic. For the purposes of this study, the most interesting data that emerged relates to the consensus across factors or perspectives.¹⁵ So while each perspective constitutes a shared subjective, or consensual, way of thinking about regime-building issues in investment treaty, the Q method study also identified shared or consensual thinking across factors or perspectives.

All of this information is particularly useful in determining how the future design of investment treaty arbitration can reflect ideas and values endorsed by both decisionmakers and discourses knowledgeable about the regime. In the following sections, each of the component parts of a Q method study will be described. This will culminate in an interpretive exercise that summarize each of the six perspectives, and how each perspective can be seen as representing a particular value orientation. While the six perspectives provide interesting results on their own, the primary purpose of the study is to

¹² For a description of the process of factor analyzing the data for a Q sort study, see Chapter 6, Section 3.4.

¹³ See Table 2 of this Chapter.

¹⁴ See Chapter 6, Section 3.4.

¹⁵ See Section 3.4.8 of this Chapter.

determine if there is an overlapping value consensus that emerges across perspectives. If there is agreement across perspectives on particular issues (and the value claims, demands, and expectations that they represent), then it is proposed that these points of consensus can provide a way forward on determine how investment treaty arbitration ought to develop into the future.

3.1 The Participants in the Study

The study includes 45 participants (the P set) with knowledge and expertise in investment treaty arbitration. While the identification of the participants remains anonymous,¹⁶ they are primarily drawn from individual requests to participate and from a general invitation submitted to the OGEMID listserv.¹⁷ Not all of the participants volunteered demographic information, but a vast majority did. The exact demographic breakdown of the participants is included in Annex I,¹⁸ but a summary is included here.

The gender of the 45 participants in the study includes the following: 30 male and 15 female. The age of the participants breaks down as follows: 7 participants are under 30, 29 participants are between 30 and 45, six participants are between 45 and 60, and three participants are over 60.¹⁹ The participants come from the following professions: two are arbitrators, eight are academics, 17 are practitioners, seven are doctor of philosophy (PhD) candidates, and 11 did not state a profession.²⁰ The participants hail from the following geographic locales: ten from North America, three from Latin America, six from Europe, one from the Commonwealth of Independent States (CIS), two from Africa, three from Australasia, five from South-East Asia, one from South Asia, and eight participants did not state a location.²¹ All participants have expertise in international law, 30 have expertise in international investment law and investor-state arbitration, 29 have expertise in international commercial arbitration, seven are knowledgeable about international trade law, and five have expertise in human rights and environmental law.²²

While 45 participants is a significant number of respondents for a Q method study, it is important to note that in this particular Q method study the number of participants was not ideal. The majority of the participants come

¹⁶ See the confidentiality agreement required for participation in the Q method study, available at: www.fairnessdiscourse.org (last accessed 1 September 2013).

¹⁷ The OGEMID (Oil, Gas, Energy, Mining, & Investment Disputes) listserv, founded by over ten years ago by the late Thomas Wälde, is a discussion group of more than 700 practitioners and academics focused in the area of international and transnational dispute resolution.

¹⁸ See Annex I, Table 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

from academic or legal practice backgrounds.²³ There is a dearth of participants from government and the business community. These two sectors are particularly important in investment treaty arbitration because they constitute the actual litigants in the process. There are also a limited number of arbitrators who participated in the study, and none of the prominent investment treaty arbitrators participated.

It would have been preferable if there had been a balance among participants that included arbitrators, governments, and business in addition to academics and practitioners. Given this shortcoming, it is possible that the results of the Q method study primarily reflect the views of academics and practitioners. There is always an element of self-interest involved in the evaluation of perspectives. This means that it is likely that the outlook, concerning the regime-building questions in investment treaty arbitration, is distinct among these different groups. However, with that said, it is interesting to note that there is no apparent correlation between academics and practitioners and the way that they configured the individual Q sorts in the study. That is, while it may have been predicted that academics would have particular perspectives distinct from those of practitioners, the study did not reflect such assumed distinctions. None of the six factors (perspectives) uncovered in the Q method study were dominated by a particular group of professionals. This is a good indication that the views about investment treaty arbitration cannot be based on the particular profession that an expert in this area of law comes from.

3.2 The Concourse and the Q Set

The 45 participants were given 40 statements (the Q set) on issues in investment treaty arbitration to rank-order according to the condition of instruction highlighted in the introductory section of this Chapter.²⁴ The statements were selected verbatim from over 10,000 pages of journal articles published between mid-2009 and mid-2011.²⁵ The 40 statements chosen constitute the Q set, and these statements were selected from a concourse of over 1000 statements taken from the aforementioned journal articles.²⁶ The 40 statements reflect most, but not all, of the issues under debate in investment treaty arbitration. Many deal with fairness and legitimacy directly, but some deal with debates about more technical issues in the regime.²⁷

Since the selection of statements is in and of itself a subjective enterprise, the experimental design technique employed assists in reducing the possibility for

²³ Id.

²⁴ See *supra* note 7.

²⁵ See *Law Journals: Submissions & Rankings, 2005-2012*, *supra* note 9.

²⁶ The list of the 1000 statements is on file with the author.

²⁷ See Section 3.2.1 through Section 3.2.8 below.

a one-sided or unbalanced selection of statements.²⁸ While some critics of Q methodology may hold that the selection of statements can skew the results, it is a fundamental premise of the theory underling Q methodology that the concourse itself is meaningless.²⁹ What is of interest for Q methodology is the way that the statements are given meaning through the process of sorting them.³⁰ When looking to analyze the results of a Q method study, the first instinct is to gravitate to where participants have placed certain statements in the Q sort matrix. This is absolutely the wrong approach. If this were the correct approach, there would be nothing to distinguish Q methodology from that of questionnaires or surveys. Q method holds that the most important aspect of the study rests on how the individual Q sorter gives meaning to the statements in the context of the other statements. This requires that the interpretation of the factor arrays for each perspective is approached holistically as a comprehensive viewpoint about the statements as a whole.

The statements selected attempt to provide a balanced and comprehensive universe of viewpoints and perspectives about a wide array of issues relating to investment treaty arbitration, and the value distribution claims that each statement represents. They have been divided into eight categories, with five statements allocated to each category. The eight categories include the following: public or private, investors versus states, arbitrators versus judges, evolution or devolution, bilateral versus multilateral, types of claims and claimants, interpretive scope, and substantive issues. The complete list of the statements used in the study are given in the following eight sub-sections below.

3.2.1 Public or Private

(Statement 4) The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.³¹

²⁸ For a discussion of the experimental design issues relating to the selection of statements in Q method studies, see Chapter 6, Section 3.2; see also Steven Brown (1980). *Political Subjectivity: Applications of Q methodology in Political Science*. New Haven, Yale University Press, pp. 186-91.

²⁹ William Stephenson (1988). *The Quantumization of Psychological Events*. Operant Subjectivity. Vol. 12, pp. 1, 9.

³⁰ See Chapter 6, Section 2.1.

³¹ Dohyun Kim (2011). *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*. New York University Law Review. Vol. 86, pp. 242, 275.

(Statement 10) Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially ‘re-politicize’ disputes and lead to the arbitration becoming a ‘court of public opinion.’³²

(Statement 31) The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.³³

(Statement 36) Litigants in investor-state disputes want fairness much less than they want victory.³⁴

(Statement 37) When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID [International Centre for the Settlement of Investment Disputes] annulment process.³⁵

3.2.2 Investors Versus States

(Statement 5) Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.³⁶

(Statement 16) Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.³⁷

³² Eugenia Levine (2011). *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*. Berkeley Journal of International Law. Vol. 29, pp. 200, 220.

³³ Alan Sawn (2010). *NAFTA Chapter 11 – ‘Direct Effect’ and Interpretive Method: Lessons from Methanex v. United States*. University of Miami Law Review. Vol. 21, pp. 21, 34.

³⁴ Jan Paulsson (2010). *The Power of States to Make Meaningful Promises to Foreigners*. Journal of International Dispute Settlement. Vol. 1, pp. 341, 349.

³⁵ William Park (2009). *Arbitrator Integrity: The Transient and the Permanent*. San Diego Law Review. Vol. 46, pp. 629, 661.

³⁶ George Foster (2011). *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*. Columbia Journal of Transnational Law. Vol. 49, pp. 201, 211-12, 251.

³⁷ Megan Shaffer (2011). *Bilateral Investment Treaties: A Friend or Foe to Human Rights?* Denver Journal of International Law & Policy. Vol. 39, pp. 483, 511.

(Statement 17) A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.³⁸

(Statement 18) A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.³⁹

(Statement 34) Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.⁴⁰

3.2.3 Arbitrators or Judges

(Statement 3) Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.⁴¹

(Statement 7) Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.⁴²

(Statement 15) The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.⁴³

³⁸ Rahim Moloo & Justin Jacinto (2011). *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*. Berkeley Journal of International Law. Vol. 29, pp. 1, 30.

³⁹ Jose Alvarez (2011). *The Return of the State*. Minnesota Journal of International Law. Vol. 20, pp. 223, 237.

⁴⁰ Paulsson, *supra* note 34 at p. 349.

⁴¹ David Schneiderman (2010) *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*. Northwestern Journal of International Law & Business. Vol. 30, pp. 383, 406.

⁴² Stephan Schill (2011). *System-Building in Investment Treaty Arbitration and Lawmaking*. German Law Journal. Vol. 12, pp. 1083, 1105.

⁴³ Alex Mills (2011). *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*. Journal of International Economic Law. Vol. 14, pp. 469, 476.

(Statement 35) It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.⁴⁴

(Statement 40) The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.⁴⁵

3.2.4 Evolution or Devolution

(Statement 11) The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.⁴⁶

(Statement 22) A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.⁴⁷

(Statement 28) When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.⁴⁸

(Statement 33) There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.⁴⁹

(Statement 39) The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard *expressis verbis*.⁵⁰

⁴⁴ Park, *supra* note 35 at p. 634.

⁴⁵ Schneiderman, *supra* note 41 at p. 402.

⁴⁶ Susan Franck (2011). *The ICSID Effect? Considering Potential Variations in Arbitration Awards*. Virginia Journal of International Law. Vol. 51, pp. 825, 848.

⁴⁷ David Smith (2011). *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*. Virginia Journal of International Law. Vol. 51, pp. 749, 760.

⁴⁸ Patrick Dumberry (2010). *Are BITs Representing the 'New' Customary International Law in International Investment Law?* Penn State International Law Review. Vol. 28, pp. 675, 681.

⁴⁹ Franck, *supra* note 46 at pp. 825, 847.

⁵⁰ Candice Wyllie (2010). *A Comparative Analysis of Nondiscrimination in Multilateral Agreements; North American Free Trade Agreement (NAFTA), Energy Charter Treaty (ECT), and General Agreement on Tariffs and Trade (GATT)*. Willamette Journal of International Law & Dispute Resolution. Vol. 18, pp. 64, 99.

3.2.5 Bilateral Versus Multilateral

(Statement 2) BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.⁵¹

(Statement 13) New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.⁵²

(Statement 24) An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.⁵³

(Statement 32) The term ‘treatment’ in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.⁵⁴

(Statement 38) Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.⁵⁵

3.2.6 Types of Claims and Claimants

(Statement 6) An ‘objective’ test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.⁵⁶

(Statement 20) The dissenting opinion on jurisdiction in *Tokios Tokelès* was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.⁵⁷

⁵¹ José Alvarez (2011). *Book Review of the Multilateralization of International Investment Law by Stephan W. Schill*. *American Journal of International Law*. Vol. 105, pp. 377, 381.

⁵² Kate Supnik (2009). *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*. *Duke Law Journal*. Vol. 59, pp. 343, 345-46.

⁵³ Zachary Douglas (2011). *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails?* *Journal of International Dispute Settlement*. Vol. 2, pp. 97, 100.

⁵⁴ August Reinisch (2011). *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?* *Journal of International Dispute Settlement*. Vol. 2, pp. 115, 145.

⁵⁵ Schill, *supra* note 42 at p. 1109.

⁵⁶ Kim, *supra* note 31 at p. 265.

⁵⁷ James Crawford (2010). *Ten Investment Arbitration Awards that Shook the World: Introduction and Overview*. *Dispute Resolution International*. Vol. 4, pp. 71, 83.

(Statement 21) It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.⁵⁸

(Statement 25) For all practical purposes, the ‘investment’ screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.⁵⁹

(Statement 29) The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.⁶⁰

3.2.7 Interpretive Scope

(Statement 1) A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty’s purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties’ intention.⁶¹

(Statement 9) If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.⁶²

(Statement 19) Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor’s expectations was justified, the host state’s right to subsequently regulate domestic matters in the public interest must also be taken into consideration.⁶³

⁵⁸ Patrick Dumberry (2010). *The Legal Standing of Shareholders before Arbitral Tribunals: Has any Rule of Customary International Law Crystallised?* Michigan State Journal of International Law. Vol. 18, pp. 353, 354.

⁵⁹ Julian Mortenson (2010). *The Meaning of ‘Investment:’ ICSID’s Travaux and the Domain of International Investment Law*. Harvard International Law Journal Vol. 51, pp. 257, 261.

⁶⁰ Id. at p. 313.

⁶¹ Shaffer, *supra* note 37 at p. 503.

⁶² Jonathan Potts (2011). *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*. Virginia Journal of International Law. Vol. 51, pp. 1005, 1032.

⁶³ Mills, *supra* note 43 at p. 493.

(Statement 23) Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.⁶⁴

(Statement 26) Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.⁶⁵

3.2.8 Substantive Issues

(Statement 8) An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.⁶⁶

(Statement 12) While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.⁶⁷

(Statement 14) The level of due diligence required under the ‘full protection and security’ standard in BITs should depend on the host state’s development and stability. The availability of resources may have a decisive impact on a state’s ability to provide protection and security.⁶⁸

(Statement 27) Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state’s other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.⁶⁹

(Statement 30) Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.⁷⁰

⁶⁴ Douglas, *supra* note 58 at p. 100.

⁶⁵ Ernst-Ulrich Petersmann (2009). *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*. Indiana Journal of Global Legal Studies. Vol. 16, pp. 513, 523.

⁶⁶ Foster, *supra* note 36 at p. 238.

⁶⁷ Moloo & Jacinto, *supra* note 30 at p. 30.

⁶⁸ Christoph Schreuer (2010). *Full Protection and Security*. Journal of International Dispute Settlement. Vol. 1, pp. 353, 367.

⁶⁹ Potts, *supra* note 62 at p. 1033.

⁷⁰ Foster, *supra* note 36 at p. 207.

3.3 The Analysis of the Study

The Q method study on configuring fairness in investment treaty arbitration asked the 45 participants to sort 40 statements according to the condition of instruction highlighted in a previous section of this Chapter. Each participant was asked to sort these statements and place them in a single box in the Q sort matrix according to the condition of instruction. A copy of the Q sort matrix is reproduced in Figure 1 below. The configuration of the matrix includes a spectrum of seven columns: from the statements that the participant most disagreed with on the far left (-3) to statements that the participant most agreed with at the far right (+3). Each statement is given a number. Where that number is placed in the Q sort then determines how it will be analyzed through the factor analytical process. Each statement is given a score within each individual Q sort. That score corresponds with the numbers in the columns in Figure 1 below.⁷¹ These scores for each of the 40 statements are then correlated with the way that all other participants configured the statements in their individual Q sorts. Q methodology uses factor analysis to look for patterns among the participants in the study. In other words, each of the six perspectives produced in this study are a reflection of six similar patterns of statement configurations among participants in the study.

The 45 participants in the Q method study completed the individual Q sorts online.⁷² The data from these Q sorts was compiled on a Microsoft Excel spreadsheet and then entered into the statistical program specifically designed for analysis of Q method studies, PQMethod.⁷³ This program factor analyzes the individual Q sorts and produces output files that correlate all the information provided in the individual Q sorts. The outcome file generated a six factor solution for the Q study.⁷⁴ These six factors explained 49 percent of the total study variance.⁷⁵ All six factors have an eigenvalue above one, which means that the factor correlates with more than one individual Q sort.⁷⁶ Hence, all six factors represent shared perspectives among the individual Q

⁷¹ Two statements will be given a score of -3, six statements will be given a score of -2, and so on.

⁷² See *Measuring the Immeasurable: Fairness Discourse in Investment Treaty Arbitration*, supra note 6.

⁷³ *PQMethod*, available at: <http://schmolck.userweb.mwn.de/qmethod> (last accessed 1 September 2013).

⁷⁴ The outcome data is on file with the author.

⁷⁵ "Statistically speaking, [the sum of all the Q sorts in the study is] 100% – the full range of meaning and variability in the study – [and] is known as the study *variance*. [emphasis in original]." See Watts & Stenner, supra note 5 at p. 98. In this study, the six factors explain 49 percent of that total universe of variability.

⁷⁶ The eigenvalue is the sum of squared factor loadings for each factor. It signifies the amount of variance among Q sorts that a particular factor represents. Generally speaking, a factor with an eigenvalue below one is considered insignificant because such a factor would represent less variance than is contained in a single individual Q sort. Since Q methodology looks for shared patterns of thought across participants, a factor with an eigenvalue below one are normally discarded.

individually in Tables 8 through 13 of Annex I. These tables give the relative position of each statement along the +3 to -3 spectrum. It also includes the standardized or Z scores for each statement in the factor array. The Z scores show how much weight the correlated individual Q sorts gave to each statement in the factor array.⁸³ These Z scores allow the data to be compiled from most agreed to least agreed among all 40 statements.⁸⁴ Tables 8 through 13 in Annex I provide the raw data from which the perspective narratives in the following section were developed.

In Table 2 below, one can see that Factors 1 and 2 had the highest number of individual Q sorts that correlate with these particular factors. These two factors also explain the highest percent of variance among all the Q sorts. For example, of all the data compiled through the 45 Q sorts, Factor 1 explains 12 percent of the total variability. In plain terms, this means that Factor 1 is indicative of the perspective of a significant number of individuals who completed the Q sort in this study. Factor 5, on the other hand, explains much less of the total variance (six percent), and only two individual Q sorts loaded significantly on that factor.⁸⁵ In Q methodology, the numbers are important because not all factors will have equal weight or importance. If one is looking to determine shared perspectives – or shared modes of thought – on a particular topic, it should be apparent that Factor 1 is indicative of more sharing than Factor 5.

In addition to the six factors, Table 1 below also highlights two additional categories: 1) Q sorts that are confounded and 2) Q sorts that did not load significantly on any factor. A confounded Q sort means that it loaded significantly on more than two factors. Normally, these Q sorts are not used in the creating the factor estimate or factor arrays for each of the perspective.⁸⁶ However, these Q sorts should not be considered as unique or necessarily atypical. The individual Q sorts that did not load significantly on any of the factors (the not significant category in Table 2 below) is indicative of an individual Q sort that is unique or atypical. They do not share perspectives with any of the other individuals who completed the study.

A generous amount of data is provided in Annex I. The Tables in Annex I provide detailed information derived from the output files generated by PQMethod. Table 4 of Annex I provides the correlation matrix of the final rotated six factor solution. As explained in the Chapter on Q methodology, the data from the individual Q sorts are first produced as unrotated factors.⁸⁷ This

⁸³ Id.

⁸⁴ E.g. Table 8 in Annex I shows the factor array for Factor 1 with Statement 34 being in the most agreed position and Statement 33 being in the least agreed position. All of the other statements are ranked in descending order between the two extremes (Statements 34 and 33, respectively).

⁸⁵ See Annex I, Table 3.

⁸⁶ Watts & Stenner, *supra* note 5 at p. 129.

⁸⁷ See Chapter 6, Section 3.4.

is data that shows all of the correlations between the individual Q sorts. It fixes the position of all the correlations. However, this data must be rotated in order to bring it into focus.⁸⁸ In this study, the unrotated factors were subjected to a varimax rotation,⁸⁹ and the output after rotation is produced in Table 4 of Annex I.

Table 1: Q Sort Factors for Q Methodology Study

Factor	Defining Q Sort	Total Q Sorts	Cumulative Total	Eigenvalue	Variance
1	1, 2, 7 , 14 , 21, 27 , (28), 29, 36, 42	10	10	5.40	12%
2	3, 5, 11, 19 , 24, 31 , 34 , 38	8	18	4.47	11%
3	4, 10, 23, 35, 43	5	23	4.05	9%
4	13, 33, 37, 40	4	28	3.60	8%
5	17, 25	2	30	2.70	6%
6	6 , 8, 15	3	33	2.25	5%
Confounded	12, 18, 20, 22, 32, 41	6	38		
Not Significant	9, 16, 26, 30, 39, 44, 45	7	45		

In Table 4 of Annex I and in Table 1 above, each of the highly correlated correlations are denoted in bold. As one can observe, some of the factors correlate above the minimum 41 percent mark on more than one factor. These are confounded Q sorts. Additionally, the individual Q sorts whose correlations all fall below the 41 percent mark are the Q sorts labeled as not significant in Table 4 of Annex I and in Table 1 above. Negative numbers in the correlation matrix signify correlations that are the polar opposite of the correlations connoted by positive numbers.⁹⁰ In this study, there were not a lot of statistically significant negative loadings on any of the factors. However, as denoted by parentheses in Table 1 above, individual Q sort 28 correlated in a statistically significant manner (54 percent) that reflects a perspective that is the polar opposite of the factor array for Factor 1.⁹¹

Table 5 of Annex I shows the correlations between the factors. That is, it provides data showing how similar each of the extracted factors are with each other. Methodologically speaking, it is advisable to have none of the factors correlate with each other in a statistically significant way (that is, in this case, a correlation above 41 percent). One of the goals of Q methodology is to

⁸⁸ Watts & Stenner, supra note 5 at pp. 113-28.

⁸⁹ Varimax rotation rotates the factors in any type of factor analytical study in a way that statistically maximizes the amount of study variance of all the factors. See Watts & Stenner, supra note 5 at p. 122.

⁹⁰ See section on bi-polar Q sorts. Watts & Stenner, supra note 5 at pp. 133-34.

⁹¹ Id.

provide data about distinct perspectives, and if the factors actually have a lot in common with each other, then there is good reason to see if too many factors have been extracted.⁹² In this study for example, Table 4 of Annex I shows that there are a number of correlations between factors. This means that there are points of commonality among some of the factors. For the purposes of this study, this is not very problematic because the overall goal is not to focus on the differences among perspectives, but to focus on the commonalities in order to determine consensual overlaps. The data in Table 5 of Annex I show similarities among the following factors: between Factor 1 and 4, between Factor 3 and 4, between Factor 2 and 3, and between Factor 2 and 5. When describing the factors (perspectives) in the next section, it will become apparent that these factors have a lot in common.

In terms of commonality across perspectives, and across individual Q sorts, two additional tables in Annex I are important. Table 6 of Annex I shows the level of consensus across all of the six factors for each statement in the Q sorts. For example, the statement that had the highest level of consensus among all the extracted factors is Statement 31.⁹³ However, this does not mean that all factors agreed with this statement. Instead, it shows that this statement was placed in almost the same position by all of the participants in the study.⁹⁴

Statement 31, for example, states:

[t]he search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.⁹⁵

None of the factors placed this statement in the most agreed position, nor did any of the factors place this statement in any of the negative positions. In general, all of the factors agreed with this statement. For a theory of configurative fairness, Table 6 of Annex I represents a most promising piece of data. It is exactly the kind of data that is needed to determine where there is an overlapping consensus among diverse individual viewpoints. Statement 31 above connotes *shared subjectivity*. It is a viewpoint or perspective – at least among the particular participants in this study – that is subjectively shared.

Another output from PQMethod is a set of data that shows the cumulative correlation between individual Q sorts. This data is provided in Table 14 of Annex I. What this data shows is the level of correlation between an individual

⁹² Watts & Stenner, *supra* note 5 at pp. 141, 212.

⁹³ See Annex I, Table 14.

⁹⁴ This Statement was placed in the following position for each of the six factors: the 0 position for Factor 1, the +2 position for Factor 2, the +1 position for Factor 3, the 0 position for Factor 4, the +2 position for Factor 5, and the +1 position for Factor 6.

⁹⁵ Statement 31, Annex I, Table 2.

Q sort and all of the other individual Q sorts in the study. For example, Q number sort 18 (a middle-aged female legal consultant from North America) correlates with 78 percent of all of the other Q sorts in the study.⁹⁶ This Q sort exemplifies the most typical configuration of the data among all the individual Q sorts. Q sort number 30 (a thirty-something male attorney from Europe), on the other hand, correlates the least with any of the other individual Q sorts in the study. Q sort number 30 only correlates with 14 percent of all the other Q sorts in the study.⁹⁷ This Q sort can be considered to be the most unique or atypical Q sort among all the Q sorts in the study. It is likely that the configuration of the statements in this Q sort has very little in common with all of the other Q sorts. Tables 15 and 16 of Annex I provide the Q sort data for Q sort numbers 30 and 18, respectively.

3.4 An Interpretation of the Results

Overall, the data from this Q method study showed that, despite the perception that all viewpoints or opinions about subjective phenomenon are unique and distinct; there is a great amount of this kind of knowledge that is shared across individuals. The basic thesis of a theory of configurative fairness is that, once this knowledge is empirically observable, it can be used to configure legal orders that are subjectively fair. This Q method study, although not perfect in its design, can significantly contribute to empirical knowledge about subjective phenomenon: both inside and outside the law.

This Q method study also showed that there is considerable consensus on many of the main regime-design issues in investment treaty arbitration. Although there were a considerable number of individual Q sorts that can be considered unique, there were also six prominent factors or perspectives that were shared among participants in the study. In this section, each of these six perspectives will be interpreted and described in a holistic fashion.⁹⁸ The goal of such an exercise is to get an idea for how the individuals attributed with each of these factors think about the future of investment treaty arbitration. Once these perspectives have been described, the focus will turn to where there is consensus across these factors in the hopes of understanding where there are points of overlapping consensus among viewpoints. The identification of these points of overlapping consensus may then provide a basis for proposals as to how investment treaty arbitration can be configured in a

⁹⁶ See Annex I, Table 14.

⁹⁷ *Id.*

⁹⁸ The raw data for this Q method study also includes participant responses to the statements that they most agreed with and most disagreed with. For confidentiality reasons, these responses have not been cited. However, these comments were used in giving additional support for the narratives on each of the six perspectives described below. These participant responses remain on file with the author.

manner that is considered as fair by the vast majority of those using this legal order.

While there were six distinct factors that were extracted, there were a number of similarities between the factors that may be helpful in understanding the interpretation of the results below. Factor 1 and 4 have a number of similarities; Factor 2 and 5 have a number of similarities; and Factor 3 has a number of similarities between Factors 2 and 4.⁹⁹ Overall, it is likely that there are four factors and three major themes embedded in the six factors. That is, Factor 1 and 4 represent a single perspective; Factors 2 and 5 represent a single perspective; Factor 3 represents a perspective that is an amalgamation of Factors 1 and 4 and Factors 2 and 5; and Factor 6 does not correlate with any other factors in the study. So while, this Q method study has been broken down into six perspectives, closer inspection of the results indicates that there are really three major themes that the study produced. These are primarily evidenced in Factors 1, 2, and 6. Factor 3 is a mix of Factors 1 and 2 (which in reality is its own unique perspective). Factor 4 and 5 are variations of Factors 1 and 2 respectively; and Factor 6 is distinct.¹⁰⁰

3.4.1 Perspective 1: A Robust International Rule of Law

Factor 1¹⁰¹ has an eigenvalue of 5.40 and explains 12 percent of the total study variance. Nine participants are significantly associated with this factor. One participant is significantly associated with the polar opposite of this factor (Q sort number 28: a female PhD candidate from South-East Asia).¹⁰² This factor has a number of similarities with Factor 4. Although each factor is distinct, this means that Factors 1 and 4 could possibly reflect a single factor that accounts a larger percentage of the total study variance. Seven participants are male and two are female. None are under 30 years of age, and most are between 45 and 60. Two are academics, two are consultants, one is a PhD candidate, one is an arbitrator, one is a practicing attorney, and two did not state their profession. Four participants are from North America, two are from Europe, one is from South-East Asia, and two did not disclose their location. All participants have expertise in international law, and all but one have specific expertise in investment treaty arbitration. None claimed to have specific expertise in other

⁹⁹ See Annex I, Table 5.

¹⁰⁰ However, Factor 6 accounts for only a small percentage of the overall study variance and this perspective is only attributable to three participants (which is significant, but not as profound in terms of the number of participants that loaded on the other factors).

¹⁰¹ See Annex I, Table 8.

¹⁰² This Q sort correlated with Factor 1 at -54 percent. This is a significant loading on this factor, but given that it is a negative number, it demonstrates that this Q sort is the polar opposite of Perspective 1. In general, Q sort 28 is likely to hold a very skeptical view about the utility of international law in general, and international investment law specifically.

*specializations in international law (such as environmental law, human rights law, or international trade law).*¹⁰³

This perspective is the dominant perspective among academics and practitioners that support a robust international rule of law in general, and a robust investment treaty regime specifically.¹⁰⁴ Those who hold this perspective believe that international law and international dispute settlement is a positive force in the world; and it should continue to develop and be promoted. The views held by this perspective are also indicative of those who, according to their critics, hold a pro-investor bias.

According to this view, investment treaties should be read expansively so as to provide the strongest possible protections for investors when treaty breaches arise from alleged state malfeasance, misfeasance, or nonfeasance. They strongly believe that international adjudication is not illegitimate and that if states do not want to delegate the resolution of international disputes to international adjudicators, they should not have entered into such agreements.¹⁰⁵ It is a political choice that states make to enter into BITs, but once they have agreed to the terms of an international treaty (including dispute settlement), they are bound by these commitments.¹⁰⁶ They also strongly believe that the criticism lobed against the international investment treaty regime is largely hyperbolic and exaggerated.¹⁰⁷ They do not believe that the rejection of ICSID by a few Latin American states is indicative of a regime on the precipice of failure;¹⁰⁸ nor do they believe that the claims of arbitrator bias stem from claimants and respondents in investment disputes. Rather, they believe that such criticism comes largely from academics and pundits.¹⁰⁹ While they believe that states have latitude to regulate in the public interest and that investors should never expect conditions to remain unchanged,¹¹⁰ they likewise believe that states have a duty to pay damages where an investor has legitimate expectations to a stable and predictable investment climate.¹¹¹

In terms of the public-private divide, this perspective endorses the status quo in terms of procedures of private adjudication currently practiced by arbitral tribunals.¹¹² This perspective is also skeptical about the utility of third party interveners in investment disputes, and tacitly holds that increasing

¹⁰³ See Annex I, Table 1.

¹⁰⁴ This factor represents the Q sort completed by the researcher. My Q sort (Q sort no. 1) correlated with this factor at 50 percent.

¹⁰⁵ Annex I, Table 6, Statement 34 (+3).

¹⁰⁶ Annex I, Table 6, Statement 2 (-3).

¹⁰⁷ Annex I, Table 6, Statement 33 (-3).

¹⁰⁸ Annex I, Table 6, Statement 11 (+3).

¹⁰⁹ Annex I, Table 6, Statement 35 (+1).

¹¹⁰ Annex I, Table 6, Statement 19 (+1).

¹¹¹ Annex I, Table 6, Statement 17 (+2).

¹¹² i.e. this perspective does not believe that there are any fundamental problems with using arbitration to solve investment treaty disputes.

transparency in investment disputes risks the (re)politicization of disputes.¹¹³ They are likewise skeptical that the issues under debate in investment treaty law are not resolvable over time as the jurisprudence develops.¹¹⁴ This perspective believes that there is no need for major reforms to the system as it currently stands (such as the negotiation of a multilateral investment treaty¹¹⁵ or the development of a permanent appellate mechanism¹¹⁶). They also hold that the current regime is developing a consistent and coherent jurisprudence through the decisions of arbitral tribunals,¹¹⁷ that the number of BITs and FTA investment chapters are restating customary international law on this subject,¹¹⁸ and that the thousands of BITs signed across the globe are producing a functional equivalent to a multilateral investment treaty.¹¹⁹

In line with their position about the importance of an international rule of law, this perspective holds that there is no excuse for Argentina to refuse compliance with ICSID awards against it, even in the case where an annulment committee delegitimized the award through its obiter dicta.¹²⁰ Likewise, they strongly disagree with the statement claiming that investment treaty arbitration is so illegitimate that there are moral grounds for states to withdraw from investment treaties and to refuse payment on investment awards rendered against them.¹²¹

Overall, this perspective holds that states are not above the law, and that where they have entered into binding treaties, they are obligated to respect the international rule of law. As supporters of a robust international rule of law, this perspective also tends to endorse expansive interpretations of treaty provisions by arbitrators. They believe that the MFN clause in BITs is wide enough to include dispute settlement provisions;¹²² that the FET standard has evolved well beyond the customary minimum standard of treatment;¹²³ that there is no need to exhaust all local remedies in before bringing a denial of justice claim under a relevant BIT;¹²⁴ that shareholders do (and should) have standing in investment disputes;¹²⁵ that the majority who granted jurisdiction in the *Tokios Tokelès* was correct;¹²⁶ that ‘essential security’ clauses should never be self-judging;¹²⁷ and that fork-in-the-road clauses should be

¹¹³ Annex I, Table 6, Statement 10 (0).

¹¹⁴ Annex I, Table 6, Statement 15 (-2).

¹¹⁵ Annex I, Table 6, Statement 13 (0).

¹¹⁶ Annex I, Table 6, Statement 37 (-1).

¹¹⁷ Annex I, Table 6, Statement 7 (+1).

¹¹⁸ Annex I, Table 6, Statement 28 (0).

¹¹⁹ Annex I, Table 6, Statement 38 (0).

¹²⁰ Annex I, Table 6, Statement 4 (-1).

¹²¹ Annex I, Table 6, Statement 33 (-3).

¹²² Annex I, Table 6, Statement 32 (+2).

¹²³ Annex I, Table 6, Statement 39 (+2).

¹²⁴ Annex I, Table 6, Statement 8 (-2), Statement 5 (+1).

¹²⁵ Annex I, Table 6, Statement 21 (+2).

¹²⁶ Annex I, Table 6, Statement 20 (-1).

¹²⁷ Annex I, Table 6, Statement 18 (-2).

interpreted narrowly.¹²⁸ Perhaps a bit surprisingly, this viewpoint also holds that the full protection and security standard should be based on the level of development in a particular state,¹²⁹ and that umbrella clauses could be used to place reciprocal obligations on investors for obligations that they have made with the states hosting their investment.¹³⁰

3.4.2 Perspective 2: A Wider Discretion in Favor of State Sovereignty

Factor 2¹³¹ has an eigenvalue of 4.47 and explains 11 percent of the study variance. Eight participants are significantly associated with this factor. This factor has a number of similarities with Factor 5. Although each factor is distinct, this means that Factors 2 and 5 could possibly reflect a single factor that accounts for a larger percentage of the total study variance. Four participants are male and four are female. Six participants are aged between 30 and 45, and two participants are under 30. Two are academics, three are practicing attorneys, one is a PhD candidate, and one did not identify a profession. Three participants are from North America, one is from Latin America, one is from the CIS, one is from Australasia, one is from South-East Asia, and one did not disclose geographical information. All participants have expertise in international law. Six have expertise in investment treaty arbitration. Three have expertise in international trade law. Four have expertise in international commercial arbitration; and one has expertise in international environmental law.

This is the dominant perspective among academics and practitioners who hold that investment treaty arbitration has exceeded its mandate and that more discretion needs to be given to state in regard to the decisions they make within their sovereign authority. This perspective is the classical pro-state position held by those who see international law as overly interventionist in regard to the regulatory and political policy choices that a state makes. While not anti-international law, this perspective favors a restrictive approach to international adjudication.

Those who endorse this perspective strongly believe that investors should never expect circumstances at the time an investment was made to remain unchanged, and that states should be given wide discretion to make regulatory changes in the public interest even if those changes negatively affect foreign investors;¹³² and not only do they believe that states should have this kind of regulatory autonomy, they should not have to compensation

¹²⁸ Annex I, Table 6, Statement 30 (+1).

¹²⁹ Annex I, Table 6, Statement 14 (-1).

¹³⁰ Annex I, Table 6, Statement 16 (0).

¹³¹ See Annex I, Table 9.

¹³² Annex I, Table 6, Statement 19 (+3).

foreign investors when these changes were made in good faith and for legitimate reasons.¹³³ For example, this perspective strongly endorses the view that states should not be liable to foreign investors when invoking precautionary measures to protect against potential threats to the environment or public health.¹³⁴

As to the interpretive scope of specific protections included in BITs, this perspective believes strongly that the assessment of a breach of the full protection and security standard should always be deferential to the state's level of development and stability;¹³⁵ that the MFN clause in the basic treaty can never be relied on to expand the jurisdiction of a tribunal by reference to the provision in a third treaty;¹³⁶ that umbrella causes should be interpreted narrowly¹³⁷ and that fork-in-the road clauses should be interpreted widely;¹³⁸ that the FET standard should reflect the customary minimum standard;¹³⁹ that a denial of justice claim cannot be brought unless all domestic remedies have been exhausted;¹⁴⁰ and that the admissibility of a claim ought to be restricted to a narrowly defined definition of what is an investor and an investment.¹⁴¹ All of these interpretive questions reflect the need for investment arbitral tribunals to heavily restrict the scope of BIT protections in favor of states.

Along the same lines, this perspective disagrees that shareholders ought to have standing in investment disputes;¹⁴² that the umbrella clause (even though they believe that it does not provide substantive protections for investors) ought to include reciprocal obligations to which the state can rely upon in the form of counterclaims;¹⁴³ that the exhaustion of local remedies rule ought to be jurisdictional hurdle to bringing a treaty claim;¹⁴⁴ and that the investment screen in the *ICSID Convention* ought to place a high threshold for the admissibility of claims above and beyond that of the BIT that confers jurisdiction.¹⁴⁵ All of this indicates that this perspective would configure investment treaty arbitration in a manner that would preclude many of the claims currently granted jurisdiction in investment treaty arbitration cases.

While this perspective is critical of many of the trends in investment treaty arbitration, and is clearly a perspective that favors more deference to states, it

¹³³ Annex I, Table 6, Statement 12 (-2).

¹³⁴ Annex I, Table 6, Statement 17 (-3).

¹³⁵ Annex I, Table 6, Statement 14 (+3).

¹³⁶ Annex I, Table 6, Statement 24 (+2).

¹³⁷ Annex I, Table 6, Statement 9 (+1), Statement 27 (0).

¹³⁸ Annex I, Table 6, Statement 30 (-2).

¹³⁹ Annex I, Table 6, Statement 39 (-2).

¹⁴⁰ Annex I, Table 6, Statement 8 (+2).

¹⁴¹ Annex I, Table 6, Statement 6 (+2), Statement 25 (-2).

¹⁴² Annex I, Table 6, Statement 21 (-1).

¹⁴³ Annex I, Table 6, Statement 16 (0).

¹⁴⁴ Annex I, Table 6, Statement 5 (-1).

¹⁴⁵ Annex I, Table 6, Statement 25 (-2).

is not a wholly radical perspective. This perspective does not want to dismantle the possibility of investment treaty arbitration, it just would like to severely restrict it. For example, this perspective does not go so far as to claim that ‘essential security’ clauses should ever be self-judging;¹⁴⁶ nor does it believe that Argentina – or any other state for that matter – has the right to refuse to pay on an award rendered against it.¹⁴⁷ In terms of the public-private divide, this perspective believes that the public nature of the subject-matter in investment treaty arbitration demands that arbitral tribunals ought to model public judiciaries. Arbitral tribunals should have recourse to appellate mechanisms,¹⁴⁸ dissents ought to be encouraged,¹⁴⁹ and transparency and third party interventions ought to be expanded and promoted.¹⁵⁰

3.4.3 Perspective 3: A Teleological-Doctrinal Focus

Factor 3¹⁵¹ has an eigenvalue of 4.05 and explains nine percent of the total study variance. Five participants are significantly associated with this factor. Five participants are significantly associated with this factor. This factor has a number of similarities with Factors 2 and 4. This means that this factor may be an amalgamation of Factors 2 and 4. Four participants are male and one is female. Four participants are aged between 30 and 45; and one participant is under 30. One participant is an academic, two are PhD candidates, and two to not state their profession. Two participants are from Africa, one participant is from South-East Asia, and one participant did not disclose geographical information. All participants have expertise in international law. Three participants have expertise in international commercial arbitration, two participants have expertise in investment treaty arbitration, and one participant has expertise in international trade law.

This perspective appears to be a balanced amalgamation of Factors 2 and 4. It is neither pro-investor nor pro-state. While it endorses the utility of an international rule of law, it does not believe that the investment treaty arbitration regime is without flaws. This perspective believes that, while useful as a form of international dispute resolution, it is in need of reform, and that it may have exceeded its mandate by excessive intruding on sovereign prerogatives through overly expansive readings of treaty standards. While this perspective believes that the object and purpose of investment treaties ought to inform interpretation of treaty standards, it is also important that interpretations do not derogate too far from the original intent of the state

¹⁴⁶ Annex I, Table 6, Statement 18 (-2).

¹⁴⁷ Annex I, Table 6, Statement 33 (-1).

¹⁴⁸ Annex I, Table 6, Statement 37 (+1).

¹⁴⁹ Annex I, Table 6, Statement 3 (-3).

¹⁵⁰ Annex I, Table 6, Statement 10 (+2).

¹⁵¹ See Annex I, Table 10.

parties who signed the treaties. For example, they believe that Prosper Weil's dissent in the jurisdiction phase of the *Tokio Tokelés* case was correct.¹⁵² That is, arbitrators need to look at what the object and purpose of the treaty when assessing whether jurisdiction ought to be granted or whether a treaty standard has been breached.

This perspective also holds that a failure to look to the fundamental political and economic purposes and social values of investment treaty arbitration can quickly lead to a loss of legitimacy.¹⁵³ This view believes that, while treaties protecting foreign investment must be interpreted teleological, there are limits on the scope of the mandate that arbitrators have in interpreting protection standards in particular disputes; and that if arbitrators are not conscious of the underlying objects and purposes of international investment law, the regime can quickly be undermined. In order to prevent a loss of legitimacy, this perspective believes that arbitrators must adhere to the specific mandate they are given in a particular dispute and to not expand interpretations of treaty standards beyond what the parties originally intended.¹⁵⁴ Such a view requires that arbitrators use textual or doctrinal approaches of treaty texts to reduce the possibility that a teleological approach goes beyond that envisioned by the parties.¹⁵⁵ To this end, this perspective does not believe that arbitrators are (or should) be driven in their decisionmaking by ideological preferences.¹⁵⁶

Like the international rule of law perspective identified by Factor 1, this perspective holds that arbitrators must understand that all international treaties tacitly refer to general principles of law where the treaty does not resolve a particular issue in express terms.¹⁵⁷ As to the specific substantive standards in investment treaties, this viewpoint believes that arbitrators must set textual boundaries to their interpretations. For example, they believe that the lack of an exhaustion of local remedies rule in most BITs means that such a rule cannot and should not be tacitly assumed where a BIT has expressly and purposeful deviated from such a rule.¹⁵⁸ Likewise, and very much in tune with a teleological-textual hybrid approach that adheres to party intent, this perspective believes that umbrella clauses in treaties were purposeful included in such treaties and they cannot be assumed to have no meaning in cases where a state has breached a contractual obligation.¹⁵⁹

In the same way, this perspective strongly disagrees with the notion that an 'essential security' clause in a treaty should be interpreted as self-judging where there is no basis to assume that this is what the parties originally

¹⁵² Annex I, Table 6, Statement 20 (+1).

¹⁵³ Annex I, Table 6, Statement 31 (+1).

¹⁵⁴ Annex I, Table 6, Statement 1 (-1).

¹⁵⁵ Annex I, Table 6, Statement 5 (+2), Statement 39 (+1).

¹⁵⁶ Annex I, Table 6, Statement 40 (-2).

¹⁵⁷ Annex I, Table 6, Statement 23 (+2).

¹⁵⁸ Annex I, Table 6, Statement 5 (+2).

¹⁵⁹ Annex I, Table 6, Statement 9 (-1), Statement 27 (+2).

intended.¹⁶⁰ As to the public-private divide, this perspective holds that investment treaty arbitration does ask arbitrators to decide on the consistency of public regulatory decisions of a state with international obligations, and therefore ought to follow a public model of adjudication: that is, to encourage dissent¹⁶¹ and third party amicus curiae submissions,¹⁶² to improve transparency¹⁶³ and to reform the regime so as to include a strong appellate mechanism for review of arbitral awards.¹⁶⁴

3.4.4 Perspective 4: A Lex Specialis Legal Order

Factor 4¹⁶⁵ has an eigenvalue of 3.60 and explains eight percent of the total study variance. Four participants are significantly associated with this factor. Two participants are male and two are female. Two participants are aged between 30 and 45; and two participants are under 30. All participants are practicing attorneys. Two are from North America, one is from Australasia, and one did not disclose his geographical location. All participants have expertise in international law. Three participants have expertise in investment treaty arbitration, and one has expertise in international commercial arbitration.

This perspective has many similarities with the international rule of law perspective evidenced by Factor 1. However, there are some differences. Where Factor 1 can be viewed as largely endorsing a status quo in investment treaty arbitration (that is, the development of investment treaty arbitration reflects the legal order that parties desire), this perspective supports a more evolutionary approach that can adapt to the changing needs of users of this legal order over time. For example, this perspective strongly believes that the FET standard in BITs does not merely state the customary minimum standard of treatment in international law,¹⁶⁶ and that FET should be understood as an independent standard that has evolved through its application in investment disputes.¹⁶⁷

Likewise, this perspective believes that umbrella clauses provide meaningful obligations on states,¹⁶⁸ and that the deviation from the exhaustion of local remedies rule in most BITs was done consciously and for good reasons.¹⁶⁹ In many ways, this view is similar to the textual-teleological approach of Factor 3. That is, BIT standards of protection should be accessed in terms of the

¹⁶⁰ Annex I, Table 6, Statement 18 (-2).

¹⁶¹ Annex I, Table 6, Statement 3 (-1).

¹⁶² Annex I, Table 6, Statement 10 (-2).

¹⁶³ Id.

¹⁶⁴ Annex I, Table 6, Statement 37 (+3).

¹⁶⁵ See Annex I, Table 11.

¹⁶⁶ Annex I, Table 6, Statement 39 (+3).

¹⁶⁷ Id.

¹⁶⁸ Annex I, Table 6, Statement 27 (+2).

¹⁶⁹ Annex I, Table 6, Statement 5 (+2).

bargain struck between two consenting state parties;¹⁷⁰ and that while general principles of international law should inform the interpretation of treaty standards, they should not override the specific commitments that parties to the treaty have made.¹⁷¹ This perspective does not believe that the culmination of thousands of BITs should reflect a *de facto* multilateral treaty,¹⁷² and that the standards applied in disputes ought to be limited to, and pay close attention to, the provisions of the particular treaty.¹⁷³

This perspective does not believe that BITs reflect a coerced relationship between developed and developing states,¹⁷⁴ and is in favor of the largely bilateral nature of investment treaties.¹⁷⁵ It does not believe that a comprehensive multilateral investment treaty is desirable or possible.¹⁷⁶ At the same time, this perspective, like Factor 1, is not skeptical of the authority of investment treaty arbitrators. This perspective believes that international law is subject to broader rule of law principles, and that there is no excuse for a state to refuse compliance with an award rendered against it.¹⁷⁷ It holds that, not only are these arbitrations legitimate, they provide a system of adjudication that can provide consistency and coherence over time without the need for a judicial system that models that of domestic judiciaries.¹⁷⁸

This perspective strongly believes that conflicting precedent in investment tribunals is not problematic and that divergence in awards is not evidence of a system under strain, but that is rather a reflection of the evolutionary dialectic moving towards a jurisprudence *constante*.¹⁷⁹ While this perspective does not see the need for an appellate mechanism for investment treaty arbitration,¹⁸⁰ it is in favor of investment arbitration reflecting a unique form of adjudication that is a hybrid of public and private adjudicative practices. That is, this perspective does not believe that dissenting opinions in awards are problematic,¹⁸¹ nor does it believe that confidentiality of proceedings should be encouraged or endorsed.¹⁸² Overall, this perspective is highly supportive of investment treaty arbitration and believes that it is a legal order that is positively evolving over time;¹⁸³ yet, it does not believe that this evolution should reflect an uniformity.¹⁸⁴ Rather, investment treaty arbitration is, and

¹⁷⁰ Annex I, Table 6, Statement 1 (+1).

¹⁷¹ Annex I, Table 6, Statement 23 (0).

¹⁷² Annex I, Table 6, Statement 28 (-2).

¹⁷³ Annex I, Table 6, Statement 9 (-2), Statement 19 (+3).

¹⁷⁴ Annex I, Table 6, Statement 2 (-2).

¹⁷⁵ Annex I, Table 6, Statement 39 (-1).

¹⁷⁶ Annex I, Table 6, Statement 13 (+2).

¹⁷⁷ Annex I, Table 6, Statement 4 (-1), Statement 33 (-3).

¹⁷⁸ Annex I, Table 6, Statement 15 (-1).

¹⁷⁹ Annex I, Table 6, Statement 7 (+2).

¹⁸⁰ Annex I, Table 6, Statement 37 (-1).

¹⁸¹ Annex I, Table 6, Statement 3 (-2).

¹⁸² Annex I, Table 6, Statement 10 (-1).

¹⁸³ Annex I, Table 6, Statement 7 (-2).

¹⁸⁴ Annex I, Table 6, Statement 31 (0).

should, continue to interpret BITs as reflecting particular bargains struck between two states.¹⁸⁵

3.4.5 Perspective 5: Investment Treaties are the Enemy of the State

Factor 5¹⁸⁶ has an eigenvalue of 2.70 and explains six percent of the total study variance. Two participants are significantly associated with this factor. One participant is male and one is female. One participant is under 30 and one is aged between 30 and 45. Neither participants disclosed their geographical location or their profession. Both participants have expertise in international law. Both have expertise in investment treaty arbitration, and one has expertise in human rights law.

This perspective is perhaps the most radical of all the perspectives. It has many similarities with Factor 2, and believes that investment treaty arbitration is biased against states. Where Factor 2 can be seen as a strong perspective in favor of reforms to investment treaty arbitration that give much wider latitude to sovereign policies, this perspective believes that investment treaty arbitration is the enemy of the state and that it should be dismantled. This perspective believes that the conflicting values in investment treaty arbitration are not resolvable through reformatory measures.¹⁸⁷ They are not ‘growing pains,’ but are a reflection of much deeper fundamental conflicts between developed and developing states, and between corporate investors and developing state.¹⁸⁸ This perspective believes that BITs are not a reflection of voluntary, uncoerced transactions, but that they are treaties that reflect north-south power dynamics aimed at the neocolonial subjugation of developing states.¹⁸⁹ They further believe that there are strong moral grounds for states to withdraw from BITs and to refuse payment on arbitral awards rendered against them.¹⁹⁰

This perspective is deeply skeptical of investor-claimants and believes that they want victory much more than they want a fair legal order that is balanced proportionately between state rights and investor rights.¹⁹¹ In terms of the substantive standards of protection, this perspective takes the position that they have all been overly expanded in favor of investor-claimants and that they should all be reinterpreted to restrict their application in favor of states. For example, this perspective believes that MFN clauses should never be

¹⁸⁵ Annex I, Table 6, Statement 1 (+1).

¹⁸⁶ See Annex I, Table 12.

¹⁸⁷ Annex I, Table 6, Statement 34 (-2).

¹⁸⁸ Annex I, Table 6, Statement 15 (+1).

¹⁸⁹ Annex I, Table 6, Statement 2 (+1), Statement 7 (-1), Statement 11 (-1).

¹⁹⁰ Annex I, Table 6, Statement 33 (+1).

¹⁹¹ Annex I, Table 6, Statement 36 (+3).

applicable to dispute settlement provisions;¹⁹² that the FET standard should merely restate the customary minimum standard;¹⁹³ that an exhaustion of local remedies rule should be included in all investment treaties;¹⁹⁴ that umbrella clause should be recast so as to include strong reciprocal obligations on investors;¹⁹⁵ that there should be a strong ‘objective’ test under the *ICSID Convention* that filters out most claims;¹⁹⁶ and that ‘essential security’ clauses should be self-judging.¹⁹⁷

Overall, this perspective would like to see investment treaty arbitration fade away, or in the alternative, that investment treaties provide a very limited basis for bringing claims against states; and that when claims do meet jurisdictional and admissibility hurdles, arbitrators should allow a wide margin of appreciation to state parties. Of all the viewpoints in the study, this perspective is the most skeptical and antagonistic about the utility of investment treaty arbitration. This perspective believes that BITs and FTA investment chapters create undue burdens on states and that a minimalist version of international investment law should be endorsed:¹⁹⁸ that is, one that does away with treaty-based arbitration.

3.4.6 Perspective 6: Arbitrators are the Problem

Factor 6¹⁹⁹ has an eigenvalue of 2.25 and explains five percent of the total study variance. Three participants are significantly associated with this factor. All three participants are male. Two participants are aged between 30 and 45; and one participant is over 60. Two participants are practicing attorneys, and one did not disclose a profession. One participant is from Europe, one is from Latin America, and one did not disclose a geographical location. All participants have expertise in international law. Two participants have expertise in international commercial arbitration, and one has expertise in international trade law.

This perspective placed less focus on the substantive standards applied by investment treaty arbitration tribunals than any other perspective. Instead, this perspective gravitated towards the statements that discuss many of the overall regime-design issues relating to the procedures of investment treaty arbitration. This perspective is not skeptical of international law;²⁰⁰ nor does it endorse a view that is particularly in favor of state discretion. Rather, this

¹⁹² Annex I, Table 6, Statement 32 (-3).

¹⁹³ Annex I, Table 6, Statement 39 (-2).

¹⁹⁴ Annex I, Table 6, Statement 5 (-2), statement 8 (+1).

¹⁹⁵ Annex I, Table 6, Statement 16 (+2).

¹⁹⁶ Annex I, Table 6, Statement 6 (+3), Statement 25 (-2).

¹⁹⁷ Annex I, Table 6, Statement 18 (+2).

¹⁹⁸ Annex I, Table 6, Statement 33 (+1), Statement 2 (+1).

¹⁹⁹ See Annex I, Table 13.

²⁰⁰ Annex I, Table 6, Statement 34 (0).

perspective is skeptical, absent serious reforms, that investment treaty arbitration can ever function as a legitimate form of international adjudication.²⁰¹

In terms of the public-private divide, this perspective strongly believes that investors should never expect circumstances to remain unchanged in the state hosting the investment, and that states should always have the latitude to regulate in the public interest.²⁰² Given the need for states to regulate, and that the subject-matter of many investment disputes calls upon arbitrators to make decisions similar to that of administrative judges, this perspective strongly believes that investment treaty arbitration should institute reforms that allow it to function as a standing body of judges with a permanent appellate process.²⁰³

Furthermore, this perspective believes that the procedural standards of investment treaty arbitration should shift so as to reflect a public model of adjudication with transparent, open processes subject to public oversight and accountability.²⁰⁴ This perspective is skeptical of international arbitrators and believes that they are driven in their decisionmaking by ideological preferences,²⁰⁵ and that they evidence a strong bias in favor of investor-claimants.²⁰⁶

Surprisingly, this perspective is not a pro-state or statist perspective. In fact it is quite sympathetic to investors with legitimate claim – such as expropriation;²⁰⁷ and that investors should be given protections under international law.²⁰⁸ With that said, however, it is very apparent that this perspective does not trust arbitrators to perform their function as independent and neutral international adjudicators.²⁰⁹ This perspective believes that absent major structural reforms, investment treaty arbitration is in the midst of a real legitimacy crisis.²¹⁰

This perspective also believes that the inconsistency of awards rendered under the current regime are fueling this legitimacy crisis;²¹¹ and that the procedures of investment treaty arbitration will never be able to produce a jurisprudence constante over time.²¹² This perspective also believes that there are strong moral grounds for states to withdraw from BITs and to refuse payments on

²⁰¹ Annex I, Table 6, Statement 15 (+2), Statement 37 (+2).

²⁰² Annex I, Table 6, Statement 19 (+3).

²⁰³ Annex I, Table 6, Statement 37 (+2).

²⁰⁴ Annex I, Table 6, Statement 10 (-1).

²⁰⁵ Annex I, Table 6, Statement 40 (-1).

²⁰⁶ Annex I, Table 6, Statement 35 (-2).

²⁰⁷ Annex I, Table 6, Statement 12 (+3).

²⁰⁸ Annex I, Table 6, Statement 34 (0).

²⁰⁹ Annex I, Table 6, Statement 37 (+2), Statement 29 (+2).

²¹⁰ Annex I, Table 6, Statement 15 (+2).

²¹¹ Annex I, Table 6, Statement 31 (+1).

²¹² Annex I, Table 6, Statement 7 (-3).

illegitimate awards rendered against them.²¹³ This is particularly the case for Argentina who has experienced directly the problem of delegitimized awards as a result of the inadequacy and structural flaws in the ICSID annulment process.²¹⁴ In line with these views, this perspective does not believe that the rejection of ICSID by a few Latin American states is an anomaly; rather, it is indicative of a larger – and growing – systemic flaw in the process of investment treaty arbitration overall.²¹⁵

3.4.7 A Note on Confounded and Not Significant Q Sorts

In this Q study, there were six confounded Q sorts. This means that these individual Q sorts loaded significantly (above 41 percent of correlation) with more than one of six perspectives detailed above. However, upon closer inspection, each of the confounded Q sorts loaded on two factors that had a number of similarities (save one). For example, Q sort number 20 loaded significantly on Factors 1 and 4; Q sort number 32 loaded on Factors 2 and 5; Q sort number 41 loaded on Factors 3 and 4; and Q sort numbers 12 and 22 loaded on Factors 2 and 3.²¹⁶

Only Q sort number 18 is less understandable. This Q sort loaded significantly on Factors 2 and 4.²¹⁷ These two perspectives have very little in common. However, it is interesting to note that Q sort number 18 is the individual Q sort that had the highest cumulative correlation among all the Q sorts in the study (that is, Q sort number 18 has 78 percent in common with all of the Q sorts in the study).²¹⁸ This certainly explains why it loaded significantly on two factors that appear to be diametrically opposed in their perspectives on investment treaty arbitration. The other five confounded Q sorts are explainable as Q sorts that loaded significantly on factors with many commonalities.²¹⁹

The Q sorts that did not load significantly on any of the six distinct factors are more problematic. There are seven Q sorts that fit into the ‘not significant’ category.²²⁰ Out of a total universe of 45 Q sorts, the fact that seven of them did not associate with any of the six factors is a bit surprising. However, there are a number of reasons why this may have occurred. First, the number of

²¹³ Annex I, Table 6, Statement 33 (+1).

²¹⁴ Annex I, Table 6, Statement 4 (+1).

²¹⁵ Annex I, Table 6, Statement 11 (-1).

²¹⁶ See Annex I, Table 4. Factors 1 and 4, Factors 2 and 5, and Factors 2 and 3 all have a number of commonalities.

²¹⁷ See Annex I, Table 5.

²¹⁸ *Id.*

²¹⁹ E.g. upon closer inspection Q sort nos. 12 and 22 appear to be reflective of advocating a teleological approach to investment treaty arbitration (Factor 3) that trends in favor of giving a wide latitude to states when defending claims against alleged treaty breaches (Factor 2).

²²⁰ See Table 2 of this Chapter.

participants that did not load on any factor could be attributable to the fact that there are so many difficult issues in investment treaty arbitration and that given such a diversity of positions, it is no wonder that there are a high number of unique or idiosyncratic perspectives. Under such a view, it may be considered odd that so many of the participants' Q sorts (33 out of 45) loaded on any of the six factors at all.

A second reason as to why there were seven Q sorts that did not correlate with any other Q sorts in the study could be attributable to the overall experimental design of the study. This Q method study is intended to provide a *comprehensive* overview of the entire regime as opposed to a particular or narrowly defined aspect of the regime. The breadth of the subject-matter in the Q study could explain why there are a high number of Q sorts that did not correlate with any of the six study factors. A third reason that may explain the seven 'not significant' Q sorts is that of study error, or it could be attributable to the fact that the participants who did not share perspectives with other participants are limited to those who are not experts in investment treaty arbitration. It is also possible that some of the statements were not clear, or that they were given alternative meanings by those seven Q sorters who did not correlate with the six dominant study perspectives.

3.4.8 Consensus Across Perspectives

For a theory of configurative fairness, the most important aspect of the Q method study lies in the identification of where there is an overlapping consensus across factors.²²¹ Often, Q method studies are designed to identify where there are differences across perspectives. Clearly, the six study factors (detailed above) demonstrate distinct points of view on how investment treaty arbitration ought to be configured. The outlooks that these six perspectives represent are indicative of many of the critiques and commendations of the regime that have been documented in the literature.²²² In fact, there is very little that is surprising about the various perspectives that emerged. They are all positions that have been identified in both the scholarly discourse and in the decisionmaking of arbitral tribunals. The novelty of the study is in its ability to distil points of consensus across factors that would be unobservable through the discourse and decisionmaking alone. The basis of a theory of configurative fairness is to identify value consensus among the distinct viewpoints and perspectives (claims, demands, and expectations) that exist in the discourse on investment treaty arbitration.

Table 7 in Annex I shows the consensus across factors for all of the statements in the Q study. There are a number of statements that, despite the

²²¹ See generally Chapter 5.

²²² See generally Chapter 7.

different overall perspectives that emerged in the study, tended to be placed in nearly identical positions across the six factors. This is not conclusive evidence that these statements produce an overlapping consensus among all of the distinct perspectives, but it is demonstrative of the type of knowledge about value distribution that could be useful in configuring fair legal orders. While any reader of this text can look at Table 7 in Annex I to assess the level of agreement and disagreement of each statement across the six study factors, a few prominent examples will be discussed as to explain how the empirical knowledge extracted from a Q method study can be used in justifying a theory of configurative fairness.

One of the most interesting examples of an overlapping consensus comes from Statement 3 in the Q method study. This statement states that:

[c]ollegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.²²³

Across all the six study factors, this statement was roundly criticized.²²⁴ All of the study factors placed this statement on the disagree to strongly disagree end of the Q sort spectrum.²²⁵ While this may be considered a surprising fact, the question then for the researcher is to try to interpret what this means in terms of value distribution.

Firstly, it is interesting because there appears to be little motivation in disagreeing with this statement purely because it is perceived to be the ‘correct’ position. It is a very subjective statement that clearly has no right or wrong answer. Further, whether one is skeptical or not about investment treaty arbitration, this statement is not indicative of a particular ideological position. It might be assumed that this statement would have been agreed to by those supportive of the current regime, and disagreed to by those reformatory positions that are challenging the status quo. However, all the six study perspective disagreed with this statement.

In terms of value distribution, it could be that the endorsement of dissenting opinions means that users with knowledge of the rules of investment treaty arbitration believe that dissenting opinions foster knowledge and transparency. It could also be that the participants in the Q method study believe that investment treaty arbitration should reflect public models of adjudication, and that dissenting opinions in the judicial context of national and international courts are a mainstay feature. Such an explanation could be that all of the six study factors do not see investment treaty arbitration as

²²³ Annex I, Table 2, Statement 3.

²²⁴ See Annex I, Table 7.

²²⁵ Id.

arbitration at all; but rather, they view the regime as one that does (or should reflect) rules and procedures that follow the methods of court systems.

Another interesting feature of this statement and its consensus across study factors is that it potentially shows that advocates of this position, such as the eminent arbitrator Albert van den Berg, are mere outliers.²²⁶ Van den Berg, on this issue, may be grossly out of step with what users of this legal order actually desire or value.²²⁷ The idea of collegiality across arbitrators is a position that is very much rooted in the practice of international commercial arbitration. It is believed that in that context, litigants in arbitral cases do not want dissenting opinions.²²⁸ They want the arbitrators to all come to a mutual understanding of the case; and that this practice is good for both ongoing business relationships and for enforcing awards in domestic courts.

Investment treaty arbitration is different, however. For good or bad reasons, investment treaty arbitrators generally do not view their role as commercial arbitrators. Instead, they view their job as one that must assist in providing stability to the regime through a consistent and coherent jurisprudence akin to a domestic constitutional court.²²⁹ Dissenting opinions are valued in this context because they can assist in the development of legal orders over time.²³⁰ Sometimes the dissenting opinion evolves into the majority opinion. If all of this is true, then it might be claimed that the rejection of Statement 3 by the participants in the Q method study says more about the regime than its mere endorsement of dissenting opinions in awards. It means that there is value in the discourse that dissents produce, that there is value in a stable regime that produces consistent and coherent awards over time, and that there is value in configuring investment treaty arbitration as a mode of public adjudication.

Another interesting statement that is evidence of an overlapping consensus is that of Statement 25. It states:

²²⁶ Albert van den Berg (2010). 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration,' in Mahnoush Arsanjani, et al., eds. *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*. The Hague, Brill, p. 824 (2010).

²²⁷ For a number of reasons, van den Berg holds that dissents should largely be avoided in investment treaty arbitration; compare with Charles Brower & Charles Rosenberg (2013). *The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*. Arbitration International. Vol. 29, p.7.

²²⁸ See Alan Redfern (2004). *The 2003 Freshfields Lecture – Dissenting Opinions in International Commercial Arbitration: The Good, the Bad, and the Ugly*. Arbitration International. Vol. 20, pp. 223, 240.

²²⁹ See Chapter 7, Section 4.1.

²³⁰ E.g. the separate opinion of Thomas Wälde in the Thunderbird case is widely cited in investment treaty tribunals on the issue of legitimate expectations. See *International Thunderbird Gaming v. United Mexican States*, NAFTA (UNCITRAL Ad Hoc Arbitration). 26 January 2006, Separate Opinion.

[f]or all practical purposes, the ‘investment’ screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.²³¹

This statement is about how arbitral tribunals define investment when interpreting BIT-based arbitrations under the *ICSID Convention*. Arbitral practice has demanded that arbitrators evaluate the jurisdictional and admissibility hurdles to a claim under both the relevant BIT and the *ICSID Convention* in these circumstances.²³²

However, in an influential article in 2010 (from where Statement 25 is taken), a scholar claimed that there was not ‘objective’ definition of investment required by the *ICSID Convention* and that the preparatory works to the Convention shows that this was a deliberate move on the part of the treaty negotiators.²³³ The definition of an investment was to be left to states to determine, in the legal instruments that they sign, which investments could be arbitrated.²³⁴ However, this position has been controversial. When the *ICSID Convention* was negotiated, there was no treaty-based arbitration practice. The *ICSID Convention* was primarily set up for contract-based claims or claims deriving from national investment laws.²³⁵ In these cases, states were free to define investors and investments as they please (either through exclusions in national investment laws or by merely not signing contracts).

BIT-based practice changed this due to the fact that BITs themselves are the consenting document.²³⁶ This creates a situation where it becomes unclear who is the gatekeeper; and what investors and investments the state parties to BITs actually intended to protect. One way that arbitrators have limited jurisdiction over BIT-based claim is by inferring an ‘objective’ definition of investment in the *ICSID Convention*.²³⁷ Since there is nothing in the Convention that defines investment, it is something that has been developed exclusively through arbitrator-made law.

One of the interesting facts is that Statement 25 was roundly disagreed with across all the six study factors. This is surprising for two reasons. First, it might be assumed that at least some of the factors in the study (probably

²³¹ Annex I, Table 2, Statement 25.

²³² For a statement on this requirement, see *Malaysian Historical Salvors v. Malaysia* (ICSID Case No. ARB/05/10). 16 April 2009, Decision on Annulment.

²³³ Mortenson, *supra* note 59.

²³⁴ *Id.*

²³⁵ The first BIT permitting investor-state arbitration was not signed until four years after the *ICSID Convention* was signed. See the discussion on the *Italy-Chad BIT* (1969) in Andrew Newcombe & Luis Paradell (2009). *The Practice of Investment Treaties: Standards of Treatment*. The Hague, Kluwer, p. 45.

²³⁶ This is problematic because BITs generally permit very wide definitions of what constitutes an investor and an investment.

²³⁷ See the so-called Salini test, *Salini Costruttori & Italstrade v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13). 29 November 2004, Decision on Jurisdiction.

Factors 1 and 4, which can be seen as highly supportive of investment treaty arbitration) would have agreed with this statement. In fact, the evidence provided in the 2010 article is very compelling.²³⁸ It would seem quite uncontroversial for avid supporters of the regime to endorse the position of Statement 25; and yet they did not.

Second, it is surprising that those who would predictably disagree with this statement (probably Factors 2 and 5, which are highly critical of the expansive scope of investment treaty arbitration jurisdiction) are actually endorsing the position that arbitrators should be the gatekeepers, and that they should be providing a teleological interpretation of the definition of investment in the *ICSID Convention*. It is assumed that those critical of the regime would like to see the interpretive scope of arbitrators to be curtailed, and yet in this situation, they are tacitly agreeing to an expansive understanding of an arbitrator's interpretive powers (that is, requiring an 'objective' definition of investment where none is required by the text of the *ICSID Convention*).

In terms of value distribution, what does disagreement with this statement mean? First, it shows that, like the statement on dissenting opinions, the position taken by a few scholars are likely outliers. It is not a position endorsed by users of the regime (or at least those that participated in the study). Second, it might show that the participants of the study value an interpretation of investment treaty arbitration jurisdiction from an evolutionary and teleological perspective. It might also show that participants in the study value a restrictive approach to the definition of investment overall; and that arbitrator-made law about an 'objective' definition of investment in the *ICSID Convention*, while not ideal, is a means for limiting claims where there is no 'real' foreign direct investment by a 'real' foreign investor.²³⁹

This position would be highly supportive of the value that arbitrators, when making decisions, ought to be very sensitive to the object and purpose of the treaties that confer their power. This view is supported by another statement that had a high level of consensus across the study factors. It states:

[t]he search for predictability and coherence in any legal system can quickly start down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.²⁴⁰

All of the six study factors agreed with this statement. There appears to be a consensus among those who both endorse and criticize the regime that a key element or value underlying the fair configuration of a legal order such as

²³⁸ See generally Mortenson, *supra* note 59.

²³⁹ See the approach taken by Prosper Weil in his dissenting opinion in the *Tokios Tokelès* case. See *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18). 29 April 2004, Dissenting Opinion on Jurisdiction.

²⁴⁰ Annex I, Table 7, Statement 31.

investment treaty arbitration is through deep analysis and understanding of its object and purpose. This would seem to suggest that the participants in the Q method study all value value. This means that the pursuit of a purely objective mandate for arbitrators is an illusion. It can be said, that in configuring a fair investment treaty arbitration regime, the underlying values that justify it must be adhered to. This is a bit of a metaclaim because it does not tell us what those values are. However, it does tell us that they are important. This is view that has been endorsed throughout this work.

Another set of statements that generated a high level of agreement across factors are the following two statements:

[i]nvestors should never expect that the circumstances prevailing at the time the investment is made will remain unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.²⁴¹

[t]he level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.²⁴²

Combined, the endorsement of these two statements can be seen as denoting the importance of contextual inquiry in legal analysis. Under such a view, the value given to context would allow arbitrators to access state liability on a case-by-case basis after the specific facts and situations have been addressed. This sounds very similar to the method of legal inquiry that the New Haven school demands.²⁴³ What is slightly surprising about the fact that all of the study factors strongly agreed with these two statements is that it reflects a need for investment treaty arbitration to reject an interpretive standard that is universal and objective.

Rather, such a view would hold that the assessment of state liability for international wrongs to a foreign investor in the context of investment treaty arbitration must be accessed in a very subjective manner. For example, the duty to provide protection and security to an investment would be different, in say the United States (US) than it would be in Somalia. Such a differentiation might be seen as objectionable to those who support a universal and objective international rule of law; and yet all of the study factors (perspectives) would indicate otherwise. But what exactly is the value being endorsed here? And can knowledge of this value assist in configuring a fair legal order? It could be that the position held by the six study factors in relation to these statements is reflective of the legitimacy crisis in investment treaty arbitration, and that by

²⁴¹ Annex I, Table 7, Statement 19.

²⁴² Annex I, Table 7, Statement 14.

²⁴³ See Chapter 4, Section 4.

agreeing to these statements, participants are making concessions and acknowledging the need for arbitrators to be more deferential to the needs and capacities of host states. If this is accurate, then there is value in how legal regimes are perceived as fair and legitimate, even if such perceptions cause adjudicators to apply legal standards on a sliding scale according to context. This is essentially José Alvarez's position: perceptions matter, and that sometimes concessions must be made in order to maintain the more important metavalues of legitimacy and fairness.²⁴⁴

What this section attempted to show is that Q methodology is a quite amazing tool for gaining empirical knowledge about value in the context of evolving legal orders. While there were a number of statements that demonstrate an overlapping consensus across the study factors, the statement highlighted above were intended to show how such a consensus might be interpreted and what that interpretation means about the values that users of the regime endorse. This is a difficult and speculative enterprise in this case. The Q method study could have been designed so as to more clearly reflect on particular values that users of the regime endorse. The idea that the endorsement of dissenting opinions is indicative of a particular value choice is difficult, though not impossible, to interpret.

However, in terms of configuring fairness, the practical implications of the study results might be more far-reaching. According to the examples of overlapping consensus in this section, it would not be speculative to hold that a fair investment treaty arbitration regime ought to pay very close attention to the object and purpose of the regime as a whole; it ought to allow arbitrators to evolve the jurisprudence according to this sensitivity to its overall object and purpose; and that discourse and the exchange of ideas (such as through dissenting opinions) is a valuable asset for any evolving legal order.

In terms of reforming the regime, the consensus statements might call for investment treaty arbitration to become akin to an international investment court, and it might call for reform of the actual treaties that confer jurisdiction to arbitrators so that the intent of the parties is more clearly delineated. Absent such reforms, a fairly configured investment treaty regime might call for arbitrators to curtail their mandate by giving more discretion to state parties to regulate in the public interest. It might also demand that arbitrators be more sensitive to the particular capacity of a host state and to determine liability according to its contextual and relative capacity.

²⁴⁴ "As was said at the recent annual meeting of the American Society of International Law, in the end, perceptions probably matter more than facts do. Governments may need to react to what influential elites and NGOs believe, even if it is not true. On those days when I think of the public relations challenges facing the investment regime, the new US model appears to be a wise concession to real politick." José Alvarez (2010). 'The Evolving BIT,' in Ian Laird & Todd Weiler, eds. *Investment Treaty Arbitration and International Law: Volume III*. New York, Juris Publishing, p. 16.

4. DISCUSSION OF THE RESULTS

One of the tricky aspects relating to the extrapolation of the underlying values that are used to inform the fairness and legitimacy of any legal order is that the issues under debate in any legal order rarely focus on values *per se*. The positions that discourses and decisionmakers take are often related to very technical requirements and interpretations of particular laws in particular situations. This means that there has to be an interpretation of what a particular position means in terms of value distribution. For example, what does the following statement mean in terms of value distribution?

The ‘fair and equitable treatment’ standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard *expressis verbis*.²⁴⁵

This could mean that endorsers of this view value a dynamic, evolutionary, and process-based approach to international law. It could also be an indicator of the value of state autonomy and consent as the basis of legality and legitimacy in international law. Or, for those who disagree with this statement, it may be indicative of support for the value of state’s rights, and the value in limiting or restricting state liability for its actions under international law (as the minimum standard is considered a much high bar for state liability than the FET standard in BITs). On its face, however, there is no explicit or express value claim being made by this statement. The value must be extrapolated through interpretation (which in itself is a subjective enterprise).

However, the goal of most positivist theories about law would claim that agreeing or disagreeing with this statement does not require any value orientation; rather, an analysis of the FET standard can be understood in a value-free and objective manner. However, if the positive analysis can provide an answer for the correct understanding of the FET standard, it seems curious that there is any debate on this issue at all. Is there a definitively objective and correct position about what the FET standard is? Or is it a matter of subjective discourse and preference? The positivist would not claim to be able to understand what the FET standard ought to be (as that imposes subjective values), but she would claim to describe and know what it is. However, it is the claim of a theory of configurative fairness that even an analysis of what a rule *is* requires value knowledge. The statement on the FET standard provides a good example of exactly how difficult it is to gain objective knowledge about the correct or right understanding of the law.

The question then becomes what Q methodology can do in assisting the legal scholar and the legal decisionmaker in determining both what the FET

²⁴⁵ Annex I, Table 6, Statement 39.

standard is, and what it ought to be. The Q method study described in this Chapter does seem to indicate that it can advance value knowledge and that the science of the subjective in the context of legal inquiry is moved forward through such an empirical methodology. However, there still is a lot of work to be done in refining the studies so that they more accurately reflect the values that users of a particular legal order endorse.

From this study, there are some broad insights and generalizations that can be made about what users of this legal order value. However, the Q method study was not able to provide definitive answers on how particular rules and principles and procedures ought to be configured so as to produce a fair legal order that its users endorse. This is likely not a flaw in Q methodology though. It may be possible to derive precise answers about value configuration on specific issues in investment treaty arbitration through Q method studies that are more focused (as opposed to this Q method study that chose to look at the regime as a whole).

CHAPTER 9

THE WAY FORWARD

While the Q method study on configuring fairness in investment treaty arbitration does provide sound empirical knowledge about perspectives and value distribution, it is far from perfect. As a theoretical frame, a theory of configurative fairness is a useful way for gaining understanding about the way that legal orders develop and the way that legal decisions are made. However, one of the initial questions that might be worth asking is whether or not Q methodology is able to provide the right type of empirical evidence needed for a theory of configurative fairness to work as an applied theory in practice?

A theory of configurative fairness was developed as a means for explaining the subjective elements of legal understanding that are not amenable to objective analysis, but that nonetheless play a significant role in determining the way that legal orders develop and evolve. The theory makes a simple claim: *legal orders will be accepted as fair if they reflect a configuration of the underlying value claims, demands, expectations (perspectives) that participants in a particular legal order actually endorse.*

The difficulty arises in attempting to determine what participants in a particular legal order actually value. This requires subjective knowledge that is not always empirically observable or amenable to understanding or analysis. This is where Q methodology is thought to contribute. As a method, it is well suited (maybe the most well suited) for the derivation of unobservable subjective phenomenon that are shared among a population of participants. The difficulty for the application of Q methodology as an empirical means in support of a theory of configurative fairness lies in the ability of Q methodology to transform shared perspectives into shared values. However, this is likely to be overcome through the experimental design of the Q method study and not a flaw in the method itself.

One of the major shortcomings in this Q method study is not in the lack of participants (45 participants is a sufficient number for any Q methodology study),¹ but in the lack of different types of participants. It was very difficult to gain participation in the Q method study and only those with a particular interest in this research participated. This, in and of itself, could skew the results. It may be that all of the perspectives in this study are the result of those with a particular fascination with empirical legal studies as opposed to those with an interest in the development of investment treaty arbitration. This could mean that most of the perspectives extracted from the study are

¹ See Simon Watts & Paul Stenner (2012). *Doing Q Methodological Research: Theory, Method, and Interpretation*. London, Sage, pp. 71-73.

those that have a scholarly bent to them, and are therefore not reflections of those who are actually impacted by the regime itself (that is, the actual claimants and respondents in investment treaty arbitrations).

An ideal participant design for a Q method study on investment treaty arbitration would seek out a balanced number of key interest groups as participants. For example, an ideal situation would be to have arbitrators, academics, practitioners, capital-exporting state officials, capital-importing state officials, civil society actors, and institutional actors (such as ICSID officials). It would also seek the participation of actual litigants in investor-state disputes, including both respondents and claimants.

A diversity of this type would be able to make more sweeping claims (generalizations) about the community of users than the present study can (which is primarily academics and practitioners). The problem with garnering participation of this kind lies in convincing very busy people, often with confidentiality issues relating to their jobs, to participate in a study that may uncover subjective information that is not in their best interest to disclose.

Another problem relating to participants lies in the fact that those affected by a particular regime may not know or understand many of the issues being debated. For example, the president of a company that has litigated claims before investment treaty tribunals may be able to comment generally on the utility of investment treaty arbitration as a dispute settlement system, but will not be able to provide opinions about the value distribution embedded in particular legal rules and principles. Likewise, investment treaty arbitration and its link to economic development more generally means that the policies surrounding the protection and promotion of foreign direct investment may have both direct and indirect effects on persons (primarily the citizens of the state hosting a foreign direct investment) with no direct relationship with investment treaty arbitration *per se*. In other words, investment treaty arbitration may have an impact on public citizens who actually know nothing about investment treaty law.²

This problem with the type of participants to be included in a Q methodology study on investment treaty arbitration is further exacerbated when attempting to define who are the users of this legal order. Defining a legal community within a finite geographical region can be difficult, defining a legal community at the global level can be near impossible. This appears to be the case with investment treaty arbitration. Its reach is truly global, and because of this, its users potentially come from a wide array of cultures and backgrounds. For Q methodology to really gain traction as a tool for configuring fair legal orders, it must be able to: 1) identify the relevant legal community, and 2) include

² These citizens could be considered participants with a voice in determining who investment treaty arbitration ought to develop, but they may not be able to participate in Q method studies relating to the technical configuration of its rules and practices.

participants from every type of actor within that community. In the case of investment treaty arbitration, for the reasons given above, this may be quite difficult to do.

However, even if a Q method study can get a perfect balance that is representative of all the different types of interests who use investment treaty arbitration, there will still be further design issues that will need to be dealt with. There were a number of issues that arose in the context of this pilot Q method study that could be improved on in future applications.

The first issue relates to the selection of the statements, and to how the statements are phrased. It may be that the selection of the statements in this Q method study attempted to be *too* comprehensive. As such, it covered a wide array of subjects relating to investment treaty arbitration, but the subjects themselves may not have had much to do with each other. One way to overcome this problem is to limit the subject-matter of a Q method study to a very specific area of focus. It may be that specific legal issues could be addressed in separate studies. One may conduct a Q method study on the scope and meaning of MFN provisions in investment treaties, for example. This would allow the researcher to design a study that could provide a number of statements that are all directly related to MFN clauses and their interpretation. With such a specified study, it is likely that very nuanced and sophisticated subjective viewpoints could be discovered.

A second issue relates to the phrasing of the statements. Some of the statements in this Q method study created compound statements where a participant might agree with one part of the statement and disagree with another part of the statement.³ This should be avoided.⁴ A third issue relates to the Q sort distribution. As identified in Chapter 6, deep or shallow distributions can be used.⁵ In our Q method study, a relatively deep distribution was used (see Table 1 above). It would have been much better to have used a shallow distribution that included a larger range of agree-disagree categories. In the case of this Q method study, there were 7 columns in which to place the statements (-3 at the right to +3 at the left). However, it is possible to use a distribution with as many as 13 columns (-6 at the right to +6 at the left). This would have allowed for much more detailed and refined points of consensus and disagreement to have emerged.

A final suggestion relating to the design of future Q method studies attempting to apply a theory of configurative fairness would be to conduct two separate

³ E.g. Statement 37 states “[w]hen investment tribunals get it wrong, neither states nor investors have meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current annulment process.” It is possible, according to this statement, for a participant to agree with the first part, but to disagree with the second part. See Statement 37, Annex I, Table 5.

⁴ See Watts & Stenner, *supra* note 1 at p. 62.

⁵ See Chapter 6, Section 3.4.

studies that the same set of participants would complete. The first study would ask the participants to rank-order a set of statements that asks very general questions about the values that they endorse in *any* given legal order. This would provide evidence of what participants value in the configuration of legal orders in *general*. The second study would then ask the participants *specific* questions about the issues under debate in a *particular* legal order such as investment treaty arbitration. Once the two studies are complete, a second-order correlation of the two studies could be conducted.⁶ This would show how one's general outlook or worldview relates to how one views specific issues in a particular legal order. This could assist in reducing the amount of interpretation and speculation that the researcher has to do in translating a participants' view about a particular legal rule and what that means in terms of that participant's view about the value distribution that such a view might endorse. While this might produce more exacting knowledge about what values are endorsed according to the problems faced by a particular legal order, it would also be quite time consuming for the participant, and might exacerbate the already present difficulty in soliciting participation.

The application of Q methodology as it is used in the context of this work is novel. Such an application has not been attempted before. The main focus of this work was to demonstrate the utility of Q methodology in providing empirical evidence about subjective phenomenon in a manner that could allow for a theory of configurative fairness to be applied to particular evolving legal orders. There is good evidence that Q methodology, if properly utilized, is up to the task. Q methodology has the ability to reduce subjective data in a way that can be objectively and scientifically evaluated. Through refinements in the way that Q methodology studies are conducted in the future, this method is capable of bridging the gap between the subjective and the objective in jurisprudential thought in a way that can facilitate the configuration of fair legal orders.

⁶ See Watts & Stenner, *supra* note 1 at pp. 53-54.

ANNEX I

Table 1: Socio-Demographic Information of Participants

No.	Gender	Age	Locale	Profession	Expertise*
1	Male	30 – 45	North America	PhD Candidate	1, 2, 3, 4, 11
2	Female	45 – 60	North America	Academic	1, 2, 3, 4, 6, 7
3	Female	30 – 45	Latin America	PhD Candidate	1, 2, 3, 8
4	Male	30 – 45	Africa	Academic	1, 4, 5
5	Male	Under 30	CIS	Institution Attorney	1, 4, 5, 6, 11
6	Male	30 – 45	Europe	Small Firm Attorney	1, 4, 5
7	Male	45 – 60	North America	Arbitrator	1, 2, 3, 4, 6, 7, 12
8	Male	30 – 45	Latin America	Gov. Attorney	1, 2, 3, 8
9	Male	30 – 45	SE Asia	Academic	1, 2, 3, 7
10	Male	30 – 45	SE Asia	PhD Candidate	1, 2, 3
11	Female	Under 30	SE Asia	Academic	1, 10, 11
12	Female	30 – 45	SE Asia	PhD Candidate	1
13	Male	Under 30		Large Firm Attorney	1, 2, 3, 4, 7
14	Male	Over 60	North America	Consultant	1, 2, 3, 4
15	Male	Over 60			1
16	Male	30 – 45	Australasia	Academic	1, 2, 3, 4, 6, 7, 11
17	Male	30 – 45			1, 2, 3, 9, 12
18	Female	30 – 45	North America	Consultant	1, 2, 3, 4, 5, 9, 11
19	Male	30 – 45	Australasia	Academic	1, 2, 3, 8, 9, 12
20	Male	30 – 45			1, 2, 3, 4, 5, 8
21	Female	45 – 60	SE Asia	Consultant	1, 8, 12
22	Female	Under 30	Europe	PhD Candidate	1, 2, 3, 6, 8, 10
23	Male	30 – 45			1, 4
24	Female	30 – 45			1, 2, 3, 4, 7
25	Female	Under 30			1, 4, 8
26	Male	30 – 45	North America	Large Firm Attorney	1, 4
27	Male	45 – 60	Europe	Academic	1, 2, 3
28	Female	30 – 45	South Asia	PhD Candidate	1, 2, 3, 4, 5
29	Male	Over 60			1, 2, 3
30	Male	30 – 45	Europe	Small Firm Attorney	1, 2, 3, 4, 8, 11
31	Male	30 – 45	North America	Large Firm Attorney	1, 2, 3, 4
32	Male	30 – 45	Latin America	Gov. Attorney	1, 2, 3, 4
33	Male	30 – 45	Australasia	Large Firm Attorney	1, 4, 7
34	Female	30 – 45	North America	Small Firm Attorney	1, 2, 3, 4, 5
35	Male	30 – 45			1
36	Male	30 – 45			1, 2, 3, 4, 6, 12
37	Female	Under 30	North America	Large Firm Attorney	1, 2, 3, 4, 6, 8, 12
38	Male	30 – 45	North America	Large Firm Attorney	1, 2, 3, 5, 8, 12
39	Male	30 – 45		Academic	1, 2, 3, 4, 5, 9, 12
40	Female	30 – 45	North America	Large Firm Attorney	1, 2, 3, 4
41	Male	30 – 45			1, 2, 3, 4, 7
42	Male	45 – 60	Europe	Small Firm Attorney	1, 4
43	Female	Under 30	Africa	PhD Candidate	1, 2, 3, 4, 8, 9
44	Female	45 – 60	Europe	Arbitrator	1, 4, 5, 11, 12
45	Male	30 – 45			4, 5, 7

All of the socio-demographic data submitted in the Q method study was self-accessed and voluntary. The individual identity of the participants remains anonymous.

* Code for Expertise

- 1 – International Law
- 2 – Investment Law
- 3 – Investor-State Arbitration
- 4 – International Arbitration
- 5 – Trade Law
- 6 – Treaty Law
- 7 – Conflicts of Law
- 8 – Public Law
- 9 – Human Rights Law
- 10 – Environmental Law
- 11 – Legal Theory
- 12 – International Relations

Table 2: List of Statements (Q Set)

No.	Statement	Category
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	Interpretive Scope
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	Bilateral Versus Multilateral
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	Arbitrators or Judges
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	Public or Private
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	Investors Versus States
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	Types of Claims and Claimants
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	Arbitrators or Judges
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	Substantive Issues
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	Interpretive Scope
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	Public or Private
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal	Evolution or Devolution

	political situation rather than a more widespread view of a lack of legitimacy.	
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	Substantive Issues
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	Bilateral versus Multilateral
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	Substantive Issues
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	Arbitrators or Judges
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	Investors Versus States
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	Investors Versus States
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	Investors Versus States
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	Interpretive Scope
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	Types of Claims and Claimants
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	Types of Claims and Claimants
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	Evolution or Devolution
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	Interpretive Scope
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	Bilateral Versus Multilateral
25	For all practical purposes, the 'investment' screen of the ICSID	Types of

	Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	Claims and Claimants
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	Interpretive Scope
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	Substantive Issues
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	Evolution or Devolution
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	Types of Claims and Claimants
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	Substantive Issues
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	Public or Private
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	Bilateral Versus Multilateral
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	Evolution or Devolution
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	Investors Versus States
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	Arbitrators or Judges
36	Litigants in investor-state disputes want fairness much less than they want victory.	Public or Private
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	Public or Private
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	Bilateral Versus Multilateral
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	Evolution or Devolution
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	Arbitrators or Judges

Table 3: Defining Q Sorts for All Six Factors

Factor	Defining Q Sort	Total Q Sorts	Cumulative Total	Eigenvalue	Variance
1	1, 2, 7, 14 , 21, 27 , (28)*, 29, 36, 42	10	10	5.40	12%
2	3, 5, 11, 19 , 24, 31 , 34 , 38	8	18	4.47	11%
3	4, 10, 23, 35, 43	5	23	4.05	9%
4	13, 33, 37, 40	4	28	3.60	8%
5	17, 25	2	30	2.70	6%
6	6 , 8, 15	3	33	2.25	5%
Confounded**	12, 18, 20, 22, 32, 41	6	38		
Not Significant***	9, 16, 26, 30, 39, 44, 45	7	45		

The Q sorts marked as bold are those whose correlations with that factor exceed 60 percent. These are defining Q sorts for that factor and were used to create the factor estimate and factor arrays for that factor.

All Q sorts attributed to a factor correlated at a level above 41 percent. This level connotes a statistically significant correlation between the individual Q sort and the factor to which it is attributed.

* A Q sort marked in parentheses connotes a bipolar factor loading for that Q sort. These Q sorts represent a configuration of the Q sort data that is the polar opposite for that factor.

** A confounded Q sort is one that had a statistically significant correlation on more than one factor. These Q sorts did not contribute to the factor estimates for any of the six factors.

*** A not significant Q sort is one that did not correlate with any of the six factors in a statistically significant way. This means that these seven Q sorts did not correlate with any of the other Q sorts in a statistically significant way. This is an indication that these Q sorts are unique or idiosyncratic. In general, these Q sorts represent limited shared thinking between other study participants.

Table 4: Correlation Matrix for All Six Factors

No.*	Factors					
	1	2	3	4	5	6
1	50	-23	25	17	-15	5
2	54	-7	31	35	17	10
3	-10	46	35	27	14	-16
4	-5	10	59	15	-22	18
5	-10	45	35	23	14	-10
6	-4	-8	5	13	2	71
7	72	3	8	13	-12	20
8	-1	14	3	17	9	46
9	19	29	40	17	-6	-3
10	27	20	47	-1	-35	-19
11	-5	69	26	-7	-11	-13
12	-2	45	47	31	1	0
13	18	5	-9	59	-12	27
14	62	14	13	26	-6	5
15	-15	11	21	-29	0	62
16	6	16	38	28	-1	-33
17	-12	10	0	27	50	24

18	32	44	12	56	-20	35
19	-3	67	7	8	14	21
20	55	-3	18	48	-2	-6
21	59	-33	-12	20	-48	-7
22	15	52	56	-7	29	2
23	25	-8	44	-15	1	24
24	8	55	4	-15	29	-7
25	10	24	13	3	51	15
26	6	-7	11	33	-33	-11
27	63	-4	34	3	24	-13
28	-54	-33	4	-1	13	32
29	55	-17	7	13	-35	-35
30	13	6	7	3	-32	13
31	21	63	9	33	8	2
32	-28	52	-7	-15	58	-12
33	30	9	34	43	-23	8
34	-20	69	5	-3	21	33
35	30	20	59	18	16	7
36	55	7	5	-2	-30	4
37	11	16	29	56	25	-1
38	27	58	27	12	-19	20
39	38	30	24	29	-3	-2
40	37	11	4	49	0	-15
41	16	-6	41	57	3	7
42	60	-15	1	15	-1	-22
43	14	19	81	11	-2	9
44	40	18	4	-24	19	-1
45	38	23	27	24	-5	-18

**	5.40	4.75	4.05	3.60	2.70	2.25
***	12%	11%	9%	8%	6%	5%

* The rows represent each of the 45 individual Q sorts used in this study.

Each number in the matrix represents the percentage that the configuration of each individual Q sort correlates with each of the six defined factors that have been extracted. The calculation for determining whether an individual Q sort significantly correlates with one or more of the factors is the following: $2.58 \times (1/\sqrt{\text{number of items in the Q set}})$. For this study, this equates to $2.58 \times (1/\sqrt{40}) = 0.41$

Any individual Q sort with a percentage above 41 percent indicates a statistically significant factor loading for that Q sort. A negative factor loading in excess of 41 percent indicates a Q sort is the polar opposite of the positive correlation.

Any individual Q sort with a percentage above 60 percent indicates a highly correlated sort. These sorts, denoted in bold, are the sorts used in constructing the factor estimates and factor arrays for each of the six factors.

** Eigenvalues. The eigenvalue is the sum of squared factor loadings for each factor. It signifies the amount of variance among Q sorts that a particular factor represents. Generally speaking, a factor with an eigenvalue below one is considered insignificant because such a factor would represent less variance than is contained in a single individual Q sort. Since Q methodology looks for shared patterns of thought across participants, a factor with an eigenvalue below one are normally discarded.

*** Variance percentage. Combined, the six factors analyzed explain 49 percent of the total variance of all the Q sorts.

Table 5: Correlations Between Factors

Factors	Factors					
	1	2	3	4	5	6
1	100	-1	38	61	30	-8
2	-1	100	54	33	47	16
3	38	54	100	52	15	16
4	61	33	52	100	-2	10
5	-30	47	15	-2	100	14
6	-8	16	16	10	14	100

This table shows the correlations between factors. A factor with a percentage above 41 percent indicates a statistically significant correlation between factors.

Table 6: Factor Arrays for All Six Factors

No.	Statement	Factors					
		1	2	3	4	5	6
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-2	-1	-1	1	2	-2
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-3	1	-1	-2	1	-1
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2	-3	-3	-2	-2	-1
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1	-1	0	-1	-2	1
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	1	-1	2	2	-2	0
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-1	2	1	0	3	-2
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	1	0	1	2	-1	-3
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	-2	2	0	2	1	0

9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	-1	1	-1	-2	0	0
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	0	-2	-2	-1	-1	-1
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	3	0	0	1	-1	-1
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-1	-2	-2	0	1	3
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	2	0	2	0	0
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1	3	2	1	1	1
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	-2	1	1	-1	1	2
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0	0	0	-2	2	1
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	2	-3	-1	1	0	0
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2	-2	-2	-3	2	-1
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	1	3	3	3	2	3
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian	-1	1	1	-1	1	2

	state and a Ukrainian investor.						
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	2	-1	-1	2	0	1
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-2	0	0	-2	-1	-2
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	1	2	2	0	-1	-2
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	0	2	1	1	1	-1
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-2	-1	-1	-2	-1
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2	0	2	1	-3	-1
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	1	0	2	2	0	1
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	0	-1	-2	-2	-2	-2
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	1	0	0	0	2
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	1	-2	2	0	0	0
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	0	2	1	0	2	1
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	2	-1	-1	0	-3	0
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-3	-1	-3	-3	1	1

34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	3	-1	-1	-1	-2	0
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	1	0	0	0	-1	-2
36	Litigants in investor-state disputes want fairness much less than they want victory.	2	1	-2	1	3	-3
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	-1	1	3	-1	2	2
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	0	0	1	-1	0	0
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	2	-2	1	3	-2	2
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	-1	1	-2	1	-1	-1

Table 7: Consensus Across Factors Matrix (Most to Least)

No.	Statements	Factors					
		1	2	3	4	5	6
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	0	2	1	0	2	1
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-2	-1	-1	-2	-1
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	2	0	2	0	0
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-2	0	0	-2	-1	-2
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2	-3	-3	-2	-2	-1
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the	0	-2	-2	-1	-1	-1

	arbitration becoming a 'court of public opinion.'						
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	1	0	0	0	2
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	0	0	1	-1	0	2
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1	3	2	1	1	1
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	-1	1	-1	-2	0	0
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	1	0	0	0	-1	-2
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1	-1	0	-1	-2	1
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	1	0	2	2	0	1
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	1	3	3	3	2	3
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	0	-1	-2	-2	-2	-2
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	1	-2	2	0	0	0
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	2	-1	-1	2	0	1
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	0	2	1	1	1	-1
20	The dissenting opinion on jurisdiction in Tokios Tokelès	-1	1	1	-1	1	2

	was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.						
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	-2	2	0	2	1	0
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0	0	0	-2	2	1
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	-2	1	1	-1	1	2
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	-1	1	3	-1	2	2
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-3	1	-1	-2	1	-1
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	1	-1	2	2	-2	0
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-2	-1	-1	1	2	-2
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	3	-1	-1	-1	-2	0
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	3	0	0	1	-1	-1
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	2	-3	-1	1	0	0
40	The awards of many investor-state tribunals indicate	-1	1	-2	1	-1	2

	that ideological preferences drive decision-making, rather than treaty text or legal norms.						
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	1	2	2	0	-1	-2
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	2	-1	-1	0	-3	0
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-1	2	1	0	3	-2
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	1	0	1	2	-1	-3
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-1	-2	-2	0	1	3
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	2	-2	1	3	-2	1
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2	0	2	1	-3	-1
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2	-2	-2	-3	2	-1
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-3	-1	-3	-3	1	1
36	Litigants in investor-state disputes want fairness much less than they want victory.	2	1	-2	1	3	-3

Table 8: Z Scores for Factor 1

No.	Statement	Q Sort Position	Z Score
34	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	3	1.9
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	3	1.8

26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2	1.3
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	2	1.1
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	2	1.0
32	The term ‘treatment’ in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	2	1.0
36	Litigants in investor-state disputes want fairness much less than they want victory.	2	0.9
39	The ‘fair and equitable treatment’ standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	2	0.9
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	1	0.8
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a <i>jurisprudence constante</i> .	1	0.8
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	1	0.8
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	1	0.8
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	1	0.7
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor’s expectations was justified, the host state’s right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	1	0.7
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state’s other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	1	0.3
14	The level of due diligence required under the ‘full protection and security’ standard in BITs should depend on the host state’s development and stability. The availability of resources	1	0.3

	may have a decisive impact on a state's ability to provide protection and security.		
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	0	0.3
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	0	0.3
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	0	0.3
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0	0.1
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	0	0.1
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	0.1
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	0.0
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	0	-0.1
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-1	-0.1
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1	-0.4
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-1	-0.5
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	-1	-0.5
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely	-1	-0.6

	international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.		
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	-1	-0.6
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-0.6
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	-1	-0.8
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-2	-0.9
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-2	-1.0
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	-2	-1.1
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	-2	-1.1
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2	-1.2
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2	-1.8
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-3	-2.0
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-3	-2.5

Table 9: Z Scores for Factor 2

No.	Statement	Q Sort Position	Z Score
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	3	2.5
14	The level of due diligence required under the 'full protection	3	1.7

	and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.		
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	2	1.5
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	2	1.4
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	2	1.1
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	2	1.0
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	2	1.0
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	2	1.0
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	1	1.0
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	1	0.9
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	1	0.7
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	1	0.7
36	Litigants in investor-state disputes want fairness much less than they want victory.	1	0.5
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	1	0.5
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	1	0.3
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT	1	0.2

	relationship is hardly a voluntary, uncoerced transaction.		
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	0	0.1
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	0	0.0
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	0	-0.1
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	0	-0.1
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0	-0.2
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	0	-0.3
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	0	-0.4
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	0	-0.4
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-1	-0.4
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-1	-0.4
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	-1	-0.5
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	-1	-0.5
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1	-0.5

28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-1	-0.5
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	-1	-0.6
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	-1	-0.7
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	-2	-0.7
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-2	-0.9
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	-2	-1.0
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-2	-1.1
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2	-1.4
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-2	-1.6
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-3	-1.8
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	-3	-1.9

Table 10: Z Scores for Factor 3

No.	Statement	Q Sort Position	Z Score
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to	3	1.9

	subsequently regulate domestic matters in the public interest must also be taken into consideration.		
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	3	1.6
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2	1.5
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	2	1.4
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	2	1.4
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	2	1.1
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	2	1.1
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	2	1.1
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	1	0.8
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard expressis verbis.	1	0.7
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	1	0.7
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	1	0.6
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	1	0.5

38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	1	0.5
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	1	0.4
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	1	0.4
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	0	0.4
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	0.3
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0	0.0
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	0	-0.1
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	-0.1
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	0	-0.2
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	0	-0.2
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	0	-0.2
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-0.3
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	-1	-0.4
34	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	-1	-0.5

9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	-1	-0.5
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	-1	-0.6
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-1	-0.6
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-1	-0.7
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	-1	-0.8
36	Litigants in investor-state disputes want fairness much less than they want victory.	-2	-0.8
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-2	-1.1
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-2	-1.1
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-2	-1.2
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2	-1.4
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	-2	-1.6
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-3	-1.8
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-3	-2.1

Table 11: Z Scores for Factor 4

No.	Statement	Q Sort Position	Z Score
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to	3	1.8

	subsequently regulate domestic matters in the public interest must also be taken into consideration.		
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	3	1.8
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a <i>jurisprudence constante</i> .	2	1.5
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	2	1.4
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	2	1.1
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	2	0.9
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	2	0.9
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	2	0.8
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1	0.8
36	Litigants in investor-state disputes want fairness much less than they want victory.	1	0.8
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	1	0.7
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	1	0.6
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	1	0.6
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	1	0.6

40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	1	0.5
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	1	0.4
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	0	0.3
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	0	0.3
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	0	0.2
32	The term ‘treatment’ in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	0	0.1
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	0	0.0
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	0	0.0
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	-0.2
6	An ‘objective’ test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	0	-0.2
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary ‘growing pains’ of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	-1	-0.3
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	-1	-0.4
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	-1	-0.4
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	-1	-0.6

4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1	-0.6
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-0.6
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	-1	-0.6
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-1	-0.7
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	-2	-0.9
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-2	-1.0
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2	-1.2
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	-2	-1.2
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-2	-1.4
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-2	-1.6
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-3	-1.8
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-3	-2.5

Table 12: Z Scores for Factor 5

No.	Statement	Q Sort Position	Z Score
36	Litigants in investor-state disputes want fairness much less than they want victory.	3	2.1
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	3	1.7
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	2	1.5
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	2	1.3
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	2	1.2
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	2	1.1
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	2	1.1
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	2	1.0
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	1	1.0
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	1	0.9
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1	0.7
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing	1	0.6

	pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.		
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	1	0.6
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	1	0.4
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	1	0.4
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	1	0.3
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	0	0.3
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	0	0.3
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	0.3
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	0	0.2
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	0	0.2
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	0	-0.1
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	0	-0.2
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	0	-0.3
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	-1	-0.3
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-1	-0.5
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and	-1	-0.5

	academics.		
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	-1	-0.5
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	-1	-0.6
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-1	-0.8
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	-1	-0.8
34	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	-1	-0.9
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	-2	-0.9
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-2	-0.9
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-2	-0.9
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard expressis verbis.	-2	-1.3
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-2	-1.4
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2	-1.6
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	-3	-1.7
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	-3	-2.3

Table 13: Z Scores for Factor 6

No.	Statement	Q Sort Position	Z Score
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	3	1.7
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	3	1.7
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	2	1.4
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	2	1.3
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	2	1.1
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	2	1.1
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	2	1.1
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	2	1.1
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1	0.9
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard expressis verbis.	1	0.8
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	1	0.8

33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	1	0.8
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	1	0.6
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	1	0.6
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	1	0.5
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	1	0.5
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	0	0.4
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	0	0.4
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	0	0.3
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	0	0.3
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	0	0.0
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	0	0.0
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	0	-0.2
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	0	-0.2
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT	-1	-0.4

	relationship is hardly a voluntary, uncoerced transaction.		
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1	-0.5
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	-1	-0.6
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-1	-0.6
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-1	-0.8
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	-1	-0.8
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-1	-0.9
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	-1	-1.0
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	-2	-1.2
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-2	-1.2
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-2	-1.2
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-2	-1.3
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	-2	-1.3
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-2	-1.4
36	Litigants in investor-state disputes want fairness much less than they want victory.	-3	-1.6
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	-3	-1.9

Table 14: Cumulative Correlation Percentage Among All Q Sorts

Q Sort	Cumulative Correlation %
1	42
2	55
3	46
4	47
5	45
6	53
7	59
8	27
9	31
10	49
11	58
12	52
13	49
14	49
15	54
16	36
17	40
18	78
19	53
20	56
21	75
22	70
23	35
24	42
25	37
26	25
27	58
28	52
29	60
30	14
31	57
32	73
33	46
34	68
35	54
36	41
37	51
38	58
39	38
40	41
41	52
42	46
43	73
44	29
45	36

This table shows the cumulative correlation between individual Q sorts and all other Q sorts in the study. The higher the percentage, the more correlated an individual Q sort is with other individual Q sorts in the study. The Q sorts indicated in bold are those that most correlated (Q sort 30) and least correlated (Q sort 18) with all of the other Q sorts in the study.

Table 15: Q Sort Most Correlated With All Other Q Sorts (No. 18)

No.	Statement	Q Sort Position
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	3
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	3
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	2
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	2
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	2
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	2
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	2
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	1
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	1
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	1
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	1
29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	1
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	1
36	Litigants in investor-state disputes want fairness much less than they want victory.	1
39	The 'fair and equitable treatment' standard in BITs is an independent treaty	1

	standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .	
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	0
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a <i>jurisprudence constante</i> .	0
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	0
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	0
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	0
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	0
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	0
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	0
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-1
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-1
20	The dissenting opinion on jurisdiction in <i>Tokios Tokelès</i> was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	-1
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	-1
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	-1
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	-1
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the	-1

	aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	-2
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-2
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	-2
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	-2
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.	-2
10	Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	-3
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-3

Table 16: Q Sort Least Correlated With All Other Q Sorts (No. 30)

No.	Statement	Q Sort Position
5	Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.	3
21	It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the corporation. This principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.	3
2	BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	2
13	New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	2
22	A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as foreclosing access to this type of justice for smaller companies.	2
26	Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.	2

29	The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.	2
38	Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.	2
11	The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	1
23	Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.	1
31	The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social values used to justify the system.	1
32	The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	1
36	Litigants in investor-state disputes want fairness much less than they want victory.	1
37	When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.	1
39	The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard expressis verbis.	1
40	The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.	1
9	If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.	0
15	The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	0
16	Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.	0
27	Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.	0
28	When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	0
30	Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	0
33	There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including	0

	a refusal to pay arbitration awards against them.	
35	It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	0
1	A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.	-1
6	An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.	-1
8	An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	-1
12	While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.	-1
17	A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	-1
20	The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.	-1
25	For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground.	-1
34	Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	-1
3	Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	-2
4	The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.	-2
7	Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.	-2
14	The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.	-2
18	A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.	-2
19	Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	-2
10	Increasing transparency and opening the doors to third-party amicus	-3

	interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	
24	An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.	-3

Table 17: Crib-Sheet for Factor 1

Items Ranked at +3	
Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	
The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	
Items Ranked Higher for Factor 1 than any other Factor	
(+3) Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.	
(+3) The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.	
(+2) The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	
(+2) A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.	
(+1) It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	
(0) When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.	
(0) Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the arbitration becoming a 'court of public opinion.'	
Items Ranked Lower for Factor 1 than any other Factor	
(-3) BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	
(-2) An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.	
(-2) The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.	
(+1) Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.	
Items Ranked at -3	
BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	
There is a strong moral as well as policy case for governments to withdraw from investment	

<p>treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.</p>

Table 18: Crib-Sheet for Factor 2

Items Ranked at +3
Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.
The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.
Items Ranked Higher for Factor 2 than any other Factor
(+3) The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.
(+2) An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.
(+1) If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.
Items Ranked Lower for Factor 2 than any other Factor
(-3) A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.
(-2) Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.
Items Ranked at -3
Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.
A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.

Table 19: Crib-Sheet for Factor 3

Items Ranked at +3
When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.
Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.
Items Ranked Higher for Factor 3 than any other Factor
(+3) When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty arbitration needs a permanent appellate body with a broader scope of review than the current ICSID annulment process.
(+2) Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.
Items Ranked Lower for Factor 3 than any other Factor

(-2) The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.
Items Ranked at -3
There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.
Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.

Table 20: Crib-Sheet for Factor 4

Items Ranked at +3
The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .
Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.
Items Ranked Higher for Factor 4 than any other Factor
(+3) The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states wanted the international minimum standard to be applied to their investment treaties, they would have opted to incorporate that standard <i>expressis verbis</i> .
(+2) Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a <i>jurisprudence constante</i> .
Items Ranked Lower for Factor 4 than any other Factor
(-3) A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.
(-2) Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.
(-2) If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.
Items Ranked at -3
There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a refusal to pay arbitration awards against them.
A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.

Table 21: Crib-Sheet for Factor 5

Items Ranked at +3
Litigants in investor-state disputes want fairness much less than they want victory.
An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.
Items Ranked Higher for Factor 5 than any other Factor

(+3) Litigants in investor-state disputes want fairness much less than they want victory.
(+3) An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.
(+2) A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible.
(+2) Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state. These clauses should be structured to allow the host state to invoke the clause as a counterclaim or even to initiate a BIT arbitration against the investor.
(+2) A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.
Items Ranked Lower for Factor 5 than any other Factor
(-3) The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.
(-3) Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.
(-2) Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties.
(-2) Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.
(-2) The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.
Items Ranked at -3
(-3) The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.
(-3) Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers.

Table 22: Crib-Sheet for Factor 6

Items Ranked at +3
While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.
Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.
Items Ranked Higher for Factor 6 than any other Factor
(+3) While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the property was taken for this reason does not affect either its nature or the measure of the compensation to be paid for the taking.
(+2) The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much

deeper conflict of interests.
(+2) Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.
(+2) The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.
(+2) The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather neatly.
(+2) The dissenting opinion on jurisdiction in Tokios Tokelès was correct. The ICSID Convention should protect all genuinely international investments but, by the same token, only genuinely international investments. This was actually a domestic dispute between the Ukrainian state and a Ukrainian investor.
(+1) The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.
(-1) Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.
Items Ranked Lower for Factor 6 than any other Factor
(-3) Litigants in investor-state disputes want fairness much less than they want victory.
(-3) Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.
(-3) An ‘objective’ test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.
(-2) It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.
(-2) Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.
(-1) An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be rewritten before the commencement of proceedings by reference to the provisions of a third treaty.
Items Ranked at -3
Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept of a coherent and uniform system, but rather is part of the evolution towards a jurisprudence constante.
Litigants in investor-state disputes want fairness much less than they want victory.

ANNEX II

Table 1: Q Methodology Study Homepage

MEASURING THE IMMEASURABLE?

Fairness Discourse in Investment Treaty Arbitration

A Technique for Evaluating Subjective Value Perspectives in Evolving Legal Orders Through the Application of Q Methodology in Legal Analysis

Start the Study ▶

Perspectives play an important role in how legal orders evolve. In looking to the future of investment treaty arbitration, this study will ask you to sort statements on how a fair legal order ought to be configured.

Confidentiality ▶

Participation in this study will be done in the strictest of confidence. At no time will participant identities be revealed. Results of the study will be available to all participants.

Q Methodology ▶

Q Methodology is a method for the scientific study of subjectivity. This method, as applied to law, gives us access to the underlying motivations, feelings, beliefs, worldviews, and perspectives that all legal decisionmakers and legal scholars bring to their endeavors.

PhD Research ▶

This study is conducted as part of the PhD dissertation titled: On the Subjectivity of Values in International Legal Discourse: A Method for the Analysis of Fairness in Investment Treaty Arbitration

Contact

"We may try to see things as objectively as we please. Nonetheless, we can never see them with the eyes except our own. I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others." Justice Benjamin Cardozo, 1921.

It is proposed that Q Methodology can help rationalize just such a process by lending objective analysis to the inescapable subjectivity of legal reasoning.

Table 2: Q Methodology Study Login Page

Getting Started

1. Enter the user code given to you in your invitation email.
2. Read and agree to the confidentiality agreement.
3. Press Begin.
4. Read the instructions on how to complete the study.
5. Fill in the optional socio-demographic information.
6. Complete the study.

Enter user code to login:

If you do not have a user code, but wish to participate, please contact the primary researcher at: dfbehn@dundee.ac.uk

Confidentiality Agreement for Participation in Q Method Study on Fairness in Investment Treaty Arbitration

To the participant of the study (the Discloser):

Recipient of Information (the Recipient): Daniel Behn, Principal Researcher and PhD Candidate in International Economic Law at the University of Dundee's Centre for Energy, Petroleum, and Mineral Law and Policy

This Confidentiality Agreement (the Agreement) covers the disclosure of information and the concealment of identity pertaining to participation in a Q methodology research study.

☐ I have read and agree with the terms of this Agreement

Table 3: Q Methodology Study Socio-Demographic Information Page

How do you characterize yourself? Please select ALL that apply:

Gender

☐ Female ☐ Male

Age Group

☐ Under 30 ☐ 30 to 45
☐ 45 to 60 ☐ 60 and Over

Your Expertise

<input type="checkbox"/> International Law	<input type="checkbox"/> Legal Theory
<input type="checkbox"/> Arbitration	<input type="checkbox"/> Administrative Law
<input type="checkbox"/> Public Law	<input type="checkbox"/> Treaty Law
<input type="checkbox"/> Conflict of Laws	<input type="checkbox"/> Transnational Litigation
<input type="checkbox"/> Investment Law	<input type="checkbox"/> Trade Law
<input type="checkbox"/> Human Right Law	<input type="checkbox"/> Environmental Law
<input type="checkbox"/> Economic Development	<input type="checkbox"/> International Business
<input type="checkbox"/> Economic Theory	<input type="checkbox"/> International Relations
<input type="checkbox"/> Political Science	<input type="checkbox"/> Legal Methodology
<input type="checkbox"/> Philosophy of Law	<input type="checkbox"/> Policy Sciences
<input type="checkbox"/> Energy Law	<input type="checkbox"/> Natural Resources Law
<input type="checkbox"/> Governance	<input type="checkbox"/> Global Justice
<input type="checkbox"/> State-Owned Enterprises	<input type="checkbox"/> Investor-State Arbitration
<input type="checkbox"/> Other <input type="text"/>	<input type="checkbox"/> Property Law

Table 4: Q Methodology Study Pre-Sort Page

In looking to the future of investment treaty arbitration, sort the following statements from most disagree to most agree according to your perspective on how a fair legal order of this type ought to be configured.

(15) The range of important issues in international investment law on which academics disagree, and on which arbitrations have reached conflicting decisions, are not the temporary 'growing pains' of a system rapidly approaching coherence, but are the product of a much deeper conflict of interests.

11/40

Disagree	Neutral	Agree
<p>(36) Litigants in investor-state disputes want fairness much less than they want victory.</p> <p>(2) BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.</p> <p>(1) A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must always be rejected as contrary to the parties' intention.</p> <p>(29) The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the timing of the two developments overlaps rather</p>	<p>(11) The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy.</p> <p>(17) A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited scientific evidence supporting a health or environmental measure, the state – and not the investor – should bear the costs of adopting that measure.</p> <p>(13) New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.</p>	<p>(8) An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke.</p> <p>(19) Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether frustration of the investor's expectations was justified, the host state's right to subsequently regulate domestic matters in the public interest must also be taken into consideration.</p> <p>(37) When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review</p>

Table 5: Q Methodology Study Q Sort Page

[illegible]

Table 6: Q Methodology Study Q Sort Page (Partially Completed)

In looking to the future of investment treaty arbitration, sort the following statements from most disagree to most agree according to your perspective on how a fair legal order of this type ought to be configured.

Most Disagree	-3	-2	-1	Neutral	+1	+2	+3	Most Agree
			(36) Litigants in investor-state disputes want fairness much less than they want victory.				(31) The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention...	
(39) The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states...								
				(21) It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the...		(8) An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such...		
		(19) Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether...						
				(33) There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a...				

	Disagree	Neutral	Agree
minimize	<p>(4) The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the annulment committee did not intend to kill the CMS award, it should not have wounded it so severely.</p> <p>(28) When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.</p> <p>(30) Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.</p>	<p>(38) Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument.</p> <p>(5) Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators have rightly interpreted most of them as eliminating the rule. The decision to do away with the rule in investor-state arbitration was made consciously and for good reasons.</p> <p>(40) The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.</p>	<p>(23) Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.</p> <p>(35) It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.</p> <p>(14) The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability. The availability of resources may have a decisive impact on a state's ability to provide protection and security.</p> <p>(37) When investment tribunals get it wrong,</p>

Table 7: Q Methodology Study Q Sort Page (Completed)

In looking to the future of investment treaty arbitration, sort the following statements from most disagree to most agree according to your perspective on how a fair legal order of this type ought to be configured.						
Most Disagree			Neutral			Most Agree
-3	-2	-1	0	+1	+2	+3
(2) BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced...	(29) The rise of the restrictive approach to the definition of investment may well be related to the broader backlash against investment arbitration – certainly the...	(14) The level of due diligence required under the 'full protection and security' standard in BITs should depend on the host state's development and stability....	(35) It is far from clear that the fear of arbitrator bias derives from governments and investors as opposed to pundits and academics.	(8) An investor cannot establish an investment treaty breach based on a denial of justice claim if there exists any available domestic legal mechanism for having such...	(15) The range of important issues in international investment law on which academics disagree, and on which arbitrators have reached conflicting...	(31) The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention...
(36) Litigants in investor-state disputes want fairness much less than they want victory.	(1) A teleological method of interpretation of a BIT provision that would result in the implementation of a treaty's purpose in a manner not contemplated by the...	(37) When investment tribunals get it wrong, neither states nor investors have any meaningful recourse to a review mechanism. Investment treaty...	(38) Rightly or wrongly, arbitral tribunals and MFN clauses are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment...	(34) Those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their...	(13) New proposals for a comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.	(3) Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should...
	(24) An MFN clause in a basic treaty cannot be relied upon by the investor to expand the jurisdiction of an international tribunal. Jurisdiction in the basic treaty cannot be...	(23) Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express...	(21) It is beyond doubt that shareholders do, and should, have standing in ICSID disputes to submit claims separate and independent from the claims of the...	(12) While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate and legal, the fact that the...	(17) A state should be entitled to adopt precautionary regulations to protect against potential health or environmental threats, but where there is only limited...	
	(27) Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty. Rather, the...	(39) The 'fair and equitable treatment' standard in BITs is an independent treaty standard that does more than merely restate customary international law. If states...	(33) There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including a...	(7) Conflicting precedent is part of the system building exercise that investor-state tribunals engage in; divergence in awards does not need to be seen as defying the concept...	(10) Increasing transparency and opening the doors to third-party amicus interveners in investor-state arbitration could potentially 're-politicize' disputes and lead to the...	
	(4) The Argentine government has rightly pondered the domestic political viability of paying on an award that an annulment committee has delegitimized. If the...	(19) Investors should never expect that the circumstances prevailing at the time the investment is made will remain totally unchanged. To determine whether...	(5) Although the exhaustion of local remedies rule is well established in the context of diplomatic protection, investment treaties are different, and arbitrators...	(25) For all practical purposes, the 'Investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have...	(26) Human rights law and investment law have many similarities; they are both aimed at legal protection of individual rights by means of legal and judicial restraints...	
	(22) A shift to a default 'loser pays' rule in investor-state arbitrations that awards costs to victorious respondents could only be seen as forcing access to this type of justice...	(28) When BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international...	(20) The dissenting opinion on jurisdiction in <i>Tokio Moku</i> was correct. The ICSID Convention should protect all genuinely international investments but, by the...	(6) An 'objective' test for defining an investment under the ICSID Convention is the correct approach. There is an objective limitation to ICSID jurisdiction separate from...	(18) A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that...	
		(30) Fork-in-the-road clauses should always be interpreted narrowly, so as to only preclude attempts to re-litigate the exact same claim against the exact same opponent.	(11) The rejection of ICSID is a phenomenon that seems to be limited to a minority of states and can be explained more by the countries' internal political situation rather than a more...	(40) The awards of many investor-state tribunals indicate that ideological preferences drive decision-making, rather than treaty text or legal norms.		
		(16) Umbrella clauses in BITs should be recast to place strong reciprocal obligations on investors that requiring them to observe commitments made to the host state....	(32) The term 'treatment' in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement.	(9) If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five...		

Table 8: Q Methodology Study Exit Interview Page

Please provide a few reasons why you most agreed (+3)	
(3) Collegiality demands that arbitrators sitting on three member tribunals reach a common view as to how the case should be resolved. Dissenting opinions should always be avoided.	
(31) The search for predictability and coherence in any legal system can quickly start one down a very short road to a loss of legitimacy if it results in a lack of attention to the fundamental economic and political purposes and social...	
Please provide a few reasons why you most disagreed (-3)	
(2) BIT partners turn to the US Model BIT with the equivalent of an IMF gun pointed at their heads. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.	
(36) Litigants in investor-state disputes want fairness much less than they want victory.	
General comments on the subject-matter of the study	
General comments on the potential utility of Q methodology in legal scholarship	

Document 1: Invitation for Participation in the Q Method Study

MEASURING THE IMMEASURABLE?

AN INVITATION TO PARTICIPATE IN A STUDY ON INDIVIDUAL PERSPECTIVES
ABOUT FAIRNESS IN INVESTMENT TREATY ARBITRATION

Daniel Behn, PhD Candidate
Centre for Energy, Petroleum, and Mineral Law and Policy
University of Dundee

As someone knowledgeable in this area of law, I would be grateful if you would participate in this study by visiting the following website:

www.fairnessdiscourse.org

To complete this Q-method study, please click on the 'Start the Study' link, follow the instructions, and enter the following login code: TDM

If you have any questions, please feel free to email me at:

dfbehn@dundee.ac.uk

In April of 2009, Professor José Alvarez delivered a lecture to the Third Annual Juris Conference on Investment Treaty Arbitration titled *The Evolving BIT*. In that lecture, he stated that perceptions really matter in international legal development – whether or not they are 'right.' This simple observation was a statement that caused concern for some in the arbitration community who claimed that there is no place for these kinds of subjective concessions in the law; in fact, it was argued, they are antithetical to the very purpose and function of a rule of law. However, more recently, in his 2011 Freshfields lecture titled *Saving Investment Arbitration from Itself*, Toby Landau QC argued that the arbitration community must pay more attention to the criticisms of investor-state proceedings. Landau claimed that the lack of inclusivity and the failure to account for all relevant perspectives are negatively affecting the development of the system as a whole.

As a PhD researcher in the field of international investment law, I have always been struck by the fact that the discussion about international investment law spans not only doctrinal analysis, but also underlying values such as fairness, legitimacy, and justice. These values in turn comprise an element of conviction, and are often grounded in ideas of

individual and political morality. Living in an era where dominant philosophical theories hold that values are both subjective and relative, claims that we can ever provide truly objective analysis about values tends to ring hollow. As such, attempting to gain reasonably objective knowledge about these considerations of fairness, legitimacy, and justice can be a challenge.

The goal of this project is not to provide definitive answers about which perspectives on fairness in investment treaty arbitration are right or wrong; rather, the idea is to provide sufficiently objective analysis about these human subjectivities in a way that the discourse can begin to move from 'perceptions matter' to 'this is how and why the various types of perceptions matter.'

In attempting to measure and understand the perspectives, underlying viewpoints, and worldviews that all legal decisionmakers and commentators use to inform and influence the way that they approach legal problems, I hope that such knowledge can assist in delineating points of overlapping consensus (among participants using the system) about issues of fairness in investment treaty arbitration. While Landau claims that we have failed both practically and scholastically in shedding light on these important aspects of legal understanding, this study seeks to remedy some of these failings by creating a methodology for the measurement of what many consider to be immeasurable: subjective value perspectives.

The study asks you to sort through statements made by actual participants in investment treaty arbitration. All of those statements reflect subjective perceptions about the diverse and complex issues currently under debate (such as, illustratively, the scope of MFN provisions or the definition of investment). The results of the study will look for the types of patterns that may emerge in the different ways that participants have rank ordered the statements.

This study is not a typical questionnaire; rather, it asks the participant to sort through a number of subjective statements (a process called Q-sorting) on issues of fairness in investment treaty arbitration and to rank order them in relation to each other. An example of the kind of statements you will be asked to sort through and rank order includes the following:

"For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground."

Participation in this study will be conducted in strict confidence. At no time will participant identities be revealed.

Document 2: Confidentiality Agreement for the Q Method Study

Confidentiality Agreement for Participation in the Investment Treaty Arbitration Q Method Study

Recipient of Information (the Recipient): Daniel Behn, Principal Researcher and PhD Candidate in International Economic Law at the University of Dundee's Centre for Energy, Petroleum, and Mineral Law and Policy in Dundee, Scotland.

Individual Disclosing Information (the Discloser): _____.

This Confidentiality Agreement (the Agreement) covers the disclosure of information pertaining to participation in a Q methodology research study.

1. The Discloser intends to disclose information (the Confidential Information) to the Recipient by participating in the Q method study on the role of fairness in the development of investment treaty arbitration at www.fairnessdiscourse.org (the Exclusive Purpose for the Disclosure).
2. The Recipient undertakes not to use the Confidential Information for any purpose except the Exclusive Purpose for the Disclosure, without first obtaining the written agreement of the Discloser.
3. The Recipient undertakes to keep the Confidential Information secure and not to disclose it to any third party, including but not limited to, any students or employees of the University of Dundee or the University of Dundee's Centre for Energy, Petroleum, and Mineral Law and Policy.
4. The Recipient undertakes not to disclose the identity of the Discloser to any third party, including but not limited to, any students or employees of the University of Dundee or the University of Dundee's Centre for Energy, Petroleum, and Mineral Law and Policy.
5. The Recipient undertakes to provide the Discloser with complete results of the Q method study upon request.
6. The Recipient will, on request from the Discloser, return all copies and records of the Confidential Information to the Discloser and will not retain any copies or records of the Confidential Information.
7. Neither this agreement nor the supply of any information grants the Recipient any license, interest or right in respect of any intellectual property rights of the Discloser except the right to copy the Confidential Information solely for the Exclusive Purpose of the Disclosure.
8. The above undertakings of this Agreement will remain in force indefinitely.
9. This Agreement is governed by, and is to be construed in accordance with, Scot law. The courts of Scotland will have non-exclusive jurisdiction to deal with any dispute which has arisen or may arise out of, or in connection with, this Agreement.

Signed on _____, 201____:



Daniel Behn (the Recipient)

_____ (the Discloser)

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